88-1134

No. _____

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IN THE

Supreme Court of the United States

October Term, 1988

LESTER W. SMITH and WESTERN RESERVE GROUP, INC.,
Petitioners,

vs.

COMBUSTION ENGINEERING, INC., C-E CAST EQUIPMENT, JAMES F. CALVERT, GEORGE E. FISHER, JR., LAWRENCE K. HUBBELL, EDWIN M. KAVANAGH, JAMES B. KELLY, JAMES E. KLIMA, THOMAS E. McGRANAHAN, WILLIAM FRANCIS ROCHE, ARTHUR F. SANTRY, JR., and FG DOE, EN ROE and JB LOE,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals For the Sixth Circuit

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APPENDIX

DECISION BY A PANEL OF THE SIXTH CIRCUIT COURT OF APPEALS, APPEALS NOS. 87-3378 AND 87-3657, AFFIRMING THE JUDGMENT OF THE DISTRICT COURT

(Filed August 24, 1988)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

No. 87-3378
No. 87-3657

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LESTER W. SMITH and
WESTERN RESERVE GROUP, INC.,
Plaintiffs-Appellants,

v.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Before: LIVELY, MERRITT, and KRUPANSKY, *Circuit Judges.*

LIVELY, *Circuit Judge.* The plaintiffs appeal from a series of district court orders culminating in final judgment for all defendants. The plaintiffs sought

damages for alleged civil rights and antitrust violations in a complaint containing three counts and eighty numbered paragraphs.

I.

According to the complaint the plaintiff Smith who was formerly an officer of C-E Cast Equipment, became a shareholder, director and president of Western Reserve Group, Inc. two years after leaving C-E Cast Equipment. Sometime thereafter the defendant Kavanagh, who was in charge of the replacement parts division of C-E Cast Equipment, discovered that one of its customers had found a new supplier for replacement parts formerly furnished to it by C-E Cast Equipment. Kavanagh hired Niam Investigations to determine the circumstances surrounding the customer's decision to find another supplier. The investigation implicated Smith and Western Reserve Group. Kavanagh and another person allegedly working for C-E Cast Equipment gave information to a state prosecutor's office concerning suspected criminal activity by Smith and Western Reserve Group that provided the basis for a search warrant for Smith's residence. As an incident to the search, officers seized property belonging to Smith and Western Reserve Group.

Thereafter Smith was indicted on the basis of grand jury testimony of Kavanagh and Edward Niam and evidence seized during the search. The four-count indictment charged Smith with theft or conversion of services, criminal simulation and possession of criminal tools. After first pleading not guilty, Smith later entered into a plea agreement with the state prosecutor by which he pled guilty to the misdemeanor charge of receiving stolen property of a value of less than $150, a lesser included offense to one of the indictment counts, and agreed to plead guilty on behalf of Western Reserve

Group to the criminal simulation charge, a fourth degree felony. Smith received a suspended sentence and fine and was placed on one year's probation. Western Reserve Group was fined $5,000 on a guilty plea entered on its behalf by Smith. A condition of Smith's probation was that he would pay to Combustion Engineering, Inc., the corporate parent of C-E Cast Equipment, the sum of $25,000. Subsequently, Smith signed a covenant not to compete with Combustion Engineering for three years in exchange for an agreement to cancel payment of the unpaid portion of the $25,000 at the end of the three-year period.

The complaint alleged that the search and seizure conducted at the defendants' instigation violated Smith's Fourth Amendment rights, and sought damages pursuant to 42 U.S.C. §1983. The complaint also sought treble damages under the Sherman Act, alleging that the defendants intended to destroy Western Reserve Group and eliminate it as a competitor for replacement parts by causing the investigation and resulting seizure of its property. It further charged that the defendants conspired with Niam Investigations and the prosecutor's office to bring about the indictment and prosecution of Smith and ultimately to coerce his guilty plea and covenant not to compete, all in violation of the antitrust laws.

II.

The district court granted the defendants' motion to dismiss the civil rights claim, brought pursuant to §1983, on the basis of limitations. The complaint charged that the defendants violated the plaintiffs' civil rights by engaging in "tortious conduct and acts in concert or conspiracy with persons acting under color of state law. . . ." More specifically, the complaint alleged that Kavanagh executed a defective affidavit for a search warrant that resulted in an unreasonable search of

Smith's residence and seizure of property of Smith and Western Reserve Group. The search occurred on December 8, 1981, and the complaint was filed on November 18, 1985.

Applying *Wilson v. Garcia*, 471 U.S. 261 (1985), and *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174 (1986), the district court held that the civil rights action was time-barred. In *Wilson v. Garcia*, the Supreme Court directed that all §1983 actions be characterized as personal injury actions for limitations purposes as a matter of federal law. This leaves "[o]nly the length of the limitations period, and closely related questions of tolling and application" to be governed by state law. 471 U.S. at 269 (footnote omitted). In *Mulligan v. Hazard* this court noted that Ohio has two statutes of limitations that arguably might be applied to §1983 actions. There is a two-year statute of limitations for actions to recover for bodily injuries. Ohio Rev. Code §2305.10. There is also a one-year statute that applies to actions for libel, slander, assault, battery, malicious prosecution, false imprisonment and malpractice. Ohio Rev. Code §2305.11. The court then determined that the one-year Ohio limitations period should apply to §1983 actions and that *Wilson v. Garcia* should be applied retroactively. 777 F.2d at 343-44.

Mulligan v. Hazard has been criticized as failing to follow the mandate of *Wilson v. Garcia* by not selecting the Ohio statute of limitations that is specifically applicable to claims based on bodily injury. This court recently granted a petition to rehear en banc a decision in which the panel followed *Mulligan v. Hazard* and applied the Ohio one-year statute of limitations period in a §1983 action. *Browning v. Pendleton*, 6th Cir. No. 86-4123, decided and filed April 8, 1988; order vacating decision and restoring case to docket as a pending appeal, June 20, 1988.

Even if this court should conclude upon rehearing that *Mulligan v. Hazard* was incorrectly decided insofar as it selected Ohio's one-year statute of limitations rather than the two-year statute, such a decision would not benefit the plaintiffs. The plaintiffs waited until nearly four years after their alleged §1983 cause of action accrued before filing their complaint. As the *Mulligan* court pointed out, Ohio's catch-all four-year statute of limitations, Ohio Rev. Code §2305.09(D), does not apply to §1983 actions. 777 F.2d at 343 n. 4.

The plaintiffs also contend that the defendants were guilty of a continuing violation that did not end until January 13, 1984 when the guilty pleas were entered. However, in this argument the plaintiffs confuse a continuing violation with the extended effects of a discrete wrongful act. See *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 558 (1977). The district court did not err in granting the motion to dismiss Count I, the civil rights claim.

III.

Counts II and III separately alleged violations of Sections 1 and 2 of the Sherman Act on behalf of the plaintiffs Western Reserve Group, Inc. and Lester W. Smith respectively. These counts charged the defendants with contracting with Niam Investigations with "a specific intent to acquire monopoly power in restraint of trade and to control price and to foreclose competition in the United States" with respect to replacement parts for equipment and manufactured and sold by the defendants Combustion Engineering, and C-E Cast Equipment. These charges related to the search of Smith's residence and seizure of his and Western Reserve Group's property and subsequent actions of various defendants in connection with the indictment of Smith by the state grand jury.

The district court granted the defendants' motion for summary judgment on Counts II and III after finding that the actions of the defendants upon which the antitrust claims were based are protected by the *Noerr-Pennington* doctrine. This rule of law, explained in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), holds that concerted efforts to influence public officials are shielded from the Sherman Act regardless of intent or purpose. This is true even though these efforts have as their sole purpose the destruction of others as competitors. *Noerr*, 365 U.S. at 138; *Pennington*, 381 U.S. at 670.

In its unpublished opinion,* the district court wrote:

> A review of the record shows that any harm that resulted to plaintiffs as a legitimate competitor at C-E Cast stemmed from the investigation, search and prosecution of plaintiffs. The investigation, search and prosecution was a result of C-E Cast's desire to protect what it, rightly or wrongly, believed to be its own product or trade secret. The *Noerr-Pennington* doctrine immunizes from antitrust liability attempts to influence the legislative process, administrative agencies or the courts. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Thus, the actions of the related defendants here are precisely those which fall under the *Noerr-Pennington* doctrine. For those reasons, the Court does not believe that questions concerning the legitimacy of plaintiff Western Reserve Group, Inc. as a competitor of C-E Cast and the availability of C-E Cast's drawing raise an issue of material fact. As to plaintiff's claims of conspiracy between the defendants and unnamed co-conspirators, the

* Petitioner's comment: The quote is from opinion authored by the district court and filed January 21, 1987 (Dist. Nv 97), A _____.

plaintiff has alleged no set of facts that would remove the defendants' conduct from the shield of the *Noerr-Pennington* doctrine.

In its most recent decision applying *Noerr-Pennington*, the Supreme Court denied antitrust immunity. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, _____ U.S. _____, 108 S. Ct. 1931 (1988). In *Allied Tube* a private, voluntary organization that publishes product standards and fire codes voted at a "packed meeting" to exclude a particular product from a code in response to a conspiracy among manufacturers of a competing product. When sued, one of the conspiring manufacturers claimed antitrust immunity on the theory that the association was "akin to a legislature" and that its activities were "consistent with acceptable standards of political action." *Id.* at 1936. While reaffirming that "[c]oncerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability" under the *Noerr-Pennington* doctrine, *id.*, the Supreme Court agreed with the court of appeals that the association should not be treated as a " 'quasi-legislative' body." *Id.* at 1937. The Court cautioned that its decision "depends on the context and nature of the activity." *Id.* at 1941 n. 10. *Allied Tube* does not speak to the present case, where the defendants resorted to the courts.

The district court also denied the plaintiffs' contention that the defendants' conduct came within the "sham exception" to the *Noerr-Pennington* doctrine. The district court rejected this argument holding that the defendants could not be found to have fostered a baseless prosecution since they prevailed in their position when the plaintiffs pled guilty. The district court relied principally on *Potters Medical Center v. City Hospital Ass'n*, 800 F.2d 568, 578 (6th Cir. 1986), in which this

court held that a defendant's activities against a competitor could not be considered a sham where the defendant's position prevailed.

In concluding that the defendants' activities in the present case were of the type *Noerr-Pennington* is designed to shield, the district court adopted the following language in *Potters*:

> Without a doubt, the intention to harm a competitor is not sufficient to make litigation or administrative proceedings a sham. The anticompetitive motive is the very matter protected under *Noerr-Pennington*. Rather, the requisite motive for the sham exception is the intent to harm one's competitors not by the result of the litigation but by the simple fact of the institution of litigation."

Potters, 800 F.2d at 579, quoting *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1156 (7th Cir. 1983), *cert. denied* 464 U.S. 891 (1983).

Summary judgment was properly granted on the basis of *Noerr-Pennington*. We have carefully considered all of the plaintiffs' remaining arguments, many relating to procedural matters within the trial court's discretion, and find them to have no merit.

The judgment of the district court is affirmed.

ISSUED AS MANDATE: October 26, 1988
COSTS: Recover by Appellee

FEES:	None
PRINTING:	$540.00
TOTAL:	$540.00

DISTRICT COURT ORDER LIMITING DISCOVERY BY PETITIONERS

(Filed January 3, 1986)

Case No. C85-3451A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

ORDER LIMITING DISCOVERY
PURSUANT TO RULE 26(c)

Presently before the court are two motions filed by the Combustion Engineering defendants. One is a motion for summary judgment under Rule 56, on the basis of a prior release of all claims by plaintiffs. The second is a motion to dismiss the First Count for alleged civil rights violations, for the reason that the claim is barred by the applicable statute of limitations.

Plaintiffs have noticed the deposition of Niam Investigations, and the Combustion Engineering defendants have moved that discovery of Niam Investigations not be had until ruling on the motion for summary judgment and the motion to dismiss.

It appearing to the court that good cause has been shown, it is hereby ORDERED that a protective order be entered herein that the scope of discovery be limited to factual issues, if any, related to the Settlement Agreement and Mutual Release and/or the statute of limitations. The (illegible) Depositions (illegible) be subject to the foregoing limitations.

/s/ DAVID D. DOWD, JR.
Judge, United States District Court

DATED this 3rd day of
January, 1985.

DISTRICT COURT MEMORANDUM OPINION

(Filed February 19, 1986)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

Before the Court are three motions filed by the defendants, Combustion Engineering, C-E Cast Equipment, James F. Calvert, George E. Fisher, Jr., Edwin M. Kavanagh, James B. Kelly, James E. Klima, Thomas E. McGranahan, William F. Roche, and Arthur J. Santry, Jr.[1] The defendants have filed the following motions: a motion to dismiss Count I of the plaintiffs' complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure; a motion for summary judgment as to all counts in the complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure; and a motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. In support of the motion for summary

[1] Defendant Lawrence K. Hubbel has not filed a motion for summary judgment or a motion to dismiss.

judgment, the defendants have provided the Court with various evidentiary exhibits. Also before the Court is the response of the plaintiffs, Lester W. Smith and Western Reserve Group, to the defendants' motions. For the reasons that follow, the motion to dismiss Count I of the plaintiffs' complaint is granted, and the motion for summary judgment on Counts II and III is denied.

I. BACKGROUND

According to the complaint, plaintiff Smith was a vice-president and general manager of defendant C-E Cast Equipment Company during the years 1970 through 1976. In 1976, Smith left C-E Cast Equipment Co., and in May of 1978 became a shareholder, director, and president of Western Reserve Group, Inc., the other plaintiff in this case. The basis for the plaintiffs' law suit stems from events occurring in 1981. According to the plaintiffs' complaint, defendant Edwin M. Kavanagh discovered that Defiance, Illinois Central Foundry, a customer of C-E Cast Equipment Company, had found a new supplier for parts formerly supplied by C-E Cast Equipment. Kavanagh hired Niam Investigations to investigate the circumstances surrounding the customer's decision to find another supplier. It appears that Niam's investigation implicated Smith and Western Reserve Group. Based on information supplied by Niam and Royalton Manufacturing, Inc., a company that produced parts sold by Western Reserve Group, Kavanagh and defendant Thomas E. McGranahan provided information to the Cuyahoga County Prosecutor's Office regarding alleged criminal activity by Smith and Western Reserve Group. The information supplied by Kavanagh and McGranahan resulted in the issuance of a search warrant authorizing the search of Smith's residence. As a result of the search, certain

property belonging to Smith and Western Reserve Group was confiscated by the Cuyahoga County Sheriff's Department.

On the basis of grand jury testimony provided by Kavanagh and Edward Niam of Niam Investigations, as well as the evidence seized pursuant to the search warrant, a Cuyahoga County Grand Jury indicted Smith for theft or conversion of services, Ohio Revised Code §1331.51; criminal simulation, §2913.32; the felony of receiving stolen property of a value greater than $150.00, §2913.51; and possession of criminal tools, §2923.24. *See* Defendants' Exhibit E. Smith pleaded not guilty to the four counts in the indictment on February 22, 1982 in the Court of Common Pleas, Cuyahoga County. Smith filed motions to suppress evidence and to dismiss the indictment, but before the court ruled on those motions, Smith agreed to accept a plea bargain arrangement offered by the prosecution. The plea bargain arrangement provided that Smith would enter a plea of guilty to the misdemeanor of receiving stolen property of a value less than $150.00, a lesser and included offense in Count III of the indictment, and the prosecutor would dismiss the other counts in the indictment. The plea arrangement further provided that Smith, on behalf of Western Reserve Group, would enter a plea of guilty to a violation of Ohio Revised Code §2913.32.[4] Under the terms of the plea arrangement, Smith's fine and sentence were suspended, and Smith was placed on one-year probation. As a condition of Smith's probation, Smith was required to pay restitution directly to Combustion Engineering in the amount of $25,000.00, with $5,000.00 payable before January 6, 1984, and the remaining

[4] Section 2913.32 is a criminal simulation statute designed to prohibit forgery involving objects rather than writings. It is a fourth degree felony.

$20,000.00 in the form of a promissory note executed by Smith and payable on December 21, 1984. Finally, Western Reserve Group was fined $5,000.00.

As part of the plea bargain arrangement, the parties executed a document titled "Settlement Agreement and Mutual Release." The release purports to discharge Combustion Engineering, C-E Cast Equipment, and Smith "fully and forever . . . from all liability, claims, and causes of action of every kind in any way arising out of the dispute. . . ." The agreement also includes a provision requiring Smith to pay to Combustion Engineering $25,000.00 in a similar manner to that under the terms of the plea arrangement.

Subsequent to the execution of the mutual release, defendant James B. Kelly, acting on behalf of Combustion Engineering, offered to defer Smith's payment on the promissory note in exchange for Smith's agreement to sign a three-year noncompetition covenant. Smith accepted Combustion Engineering's offer and signed a covenant not to complete with Combustion Engineering for three years.

The plaintiffs' complaint first alleges a cause of action under 42 U.S.C. §1983. Smith alleges that the defendants conspired with the county prosecutor and the Sheriff's Department to conduct an illegal search of the plaintiff's residence in violation of the fourth amendment.[5] The plaintiffs request four million dollars in damages plus interest, costs, and attorneys' fees. Count II alleges a violation of §§1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2 (1982), and the antitrust laws of the

[5] The plaintiffs appear to allege a violation of the Ohio Constitution. To the extent the plaintiffs intend in the complaint to allege a violation of the Ohio Constitution, the Court considers it a claim pendent to the §1983 claim, and dismisses it. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

United States, on behalf of plaintiff Western Reserve Group. The plaintiffs allege that the defendants conspired with Niam Investigations with the intent to gain a monopoly and restraint of trade, and to foreclose competition in both the actual and relevant markets. In a nutshell, the plaintiffs contend that the defendants intended to destroy Western Reserve Group as a business entity by causing the investigation, which resulted in the seizure and confiscation of Western Reserve Group property essential to day-to-day business operations. The plaintiffs request six million dollars in damages, trebled, plus interest, costs, and attorneys' fees.

Count II alleges violations of §§1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2 (1982), and the antitrust laws of the United States, on behalf of Lester W. Smith. The plaintiffs contend that the defendants conspired with Niam Investigations and the County Prosecutor's Office with the intent to deprive Smith of the ability to perform "personal services" and to function in the business community. The plaintiffs contend that the indictment of Smith, the prosecution of Smith, the arrangement of the plea bargain, and ultimately the offer by Combustion Engineering to cancel the $20,000.00 debt in exchange for a promise not to compete constitutes a conspiracy in violation of the Sherman Act and the antitrust laws. The plaintiffs request one million dollars in damages, trebled, plus interest, costs, and attorneys' fees.

II. DISCUSSION AND LAW

A. *Defendants' Motion to Dismiss.*

The defendants have moved to dismiss Count I of the plaintiffs' complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The defendants argue

that the plaintiffs' §1983 action is based on a trespass to property in violation of the fourth amendment.[6] The trespass occurred on December 8, 1981, when the Cuyahoga County Sheriff's Department served the search warrant on Smith and Western Reserve Group and searched his home, and seized certain personal property belonging to the plaintiff and Western Reserve Group. Looking only at the pleadings, as is required under Rule 12(b)(6), defendants argue that the plaintiffs' action is barred by the statute of limitations.

In *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), the Supreme Court determined that "section 1983 claims are best characterized as personal injury actions . . ." and held that the state statute of limitations for personal injuries in tort should govern §1983 actions. *Id.* at 1948-49. In concluding that the state personal injury statute of limitations should be applied to §1983 actions, the Court rejected other possibly analogous state limitations statutes, including those controlling breach of contract claims, tort claims for property damage, tort claims based on wrongful acts by public officials, and claims not otherwise accounted for in state statutes (the "catchall" limitations provisions). *Id.*

The Sixth Circuit has further refined the Supreme Court's holding in *Wilson v. Garcia*. In *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), the Sixth Circuit was faced with choosing between the two Ohio statutes of limitation applicable to personal injury actions. In selecting between the two-year statute of limitations for bodily injuries, *see* Ohio Rev. Code Ann. §2305.10 (Page Supp. 1984), and the one-year statute of limitations for

[6] The plaintiffs' response brief indicates that they agree that the §1983 claim is based on trespass to property in violation of the fourth amendment.

tort actions based on libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice, *see* Ohio Rev. Code Ann. §2305.11 (Page Supp. 1984), the court determined that the one-year statute of limitations is more appropriate for application in §1983 actions. *Id.* at 344. The court reasoned that Congress' chief concern in passing the Civil Rights Act of 1871 was to provide redress for constitutional violations stemming from intentional tortious conduct, and concluded that the one-year statute of limitations, "which applies to actions involving assault, batteries, and the like, more specifically encompasses the sorts of actions which concerned Congress as it enacted the Civil Rights statutes." *Id.* The court thus adopted a one-year statute of limitations for §1983 actions brought in Ohio.

The Sixth Circuit also determined that the holding in *Wilson v. Garcia* should be applied retroactively to cases filed before the date of the decision. The Court analogized the result in *Wilson* to that in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), in which the Supreme Court implicitly applied retroactively its holding on the appropriate statute of limitations in §301 actions. The Sixth Circuit thus held that the *Wilson* case implicitly calls for a retroactive application of its holding. *Mulligan v. Hazard*, 777 F.2d at 344.

The plaintiffs base their §1983 actions on alleged violations of their fourth amendment rights resulting from the search and seizure of Smith and Western Reserve Group's property. The complaint indicates that the allegedly illegal search and seizure occurred on December 8, 1981. Thus under *Mulligan*, to be timely the plaintiffs must have filed their action by December 8, 1982. The case was filed, however, on November 18,

1985, nearly four years after the allegedly illegal conduct. Applying the holding in *Wilson v. Garcia*, as refined by Mulligan, retroactively, the plaintiffs' action is time barred.[7] Accordingly, the Court dismisses Count I of the plaintiffs' complaint.

B. *Defendants' Motion for Summary Judgment.*

The defendants have moved for summary judgment on all counts[8] based on the release granted to defendants Combustion Engineering, C-E Cast Equipment, and their officers and employees by plaintiff Smith and Western Reserve Group, Inc., in conjunction with the plea arrangement entered into on January 13, 1984. In support of their motion, the defendants have provided the Court with the affidavit of Donald L. Southam, the president and general manager of C-E Cast Equipment. In the affidavit, Southam attests to the authenticity of the exhibits appended to the defendants' motion, consisting of a copy of the Settlement Agreement and Mutual Release, a copy of the transcript of proceedings in *Ohio v. Smith*, in which the plaintiff Smith entered their guilty pleas, the copy of the plea agreement between the State of Ohio and plaintiffs Smith and Western Reserve Group, and a copy of the promissory note signed by Lester Smith on January 13, 1984, promising to pay to Combustion Engineering the sum of $20,000.00.

In response, the plaintiffs have filed the affidavit of Lester Smith, in which he verifies the allegations made in the complaint and indicates that after leaving the employ

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[7] The Court notes that even if Ohio's two-year statute was applicable in this case, the plaintiffs' action is still time barred.

[8] The Court notes that it has already dismissed Count I of the plaintiffs' complaint.

of Combustion Engineering in 1976, he received no money or compensation from Combustion Engineering or C-E Cast Equipment.[9] The Court finds that Smith's affidavit does not create a factual dispute with regard to the legality of the release, and concludes that the plaintiff has failed to demonstrate the existence of genuine issues of material fact.

The Settlement Agreement and Mutual Release, entered into by Lester W. Smith, his heirs, personal representatives, and assigns, and Western Reserve Group, its assigns, officers, agents and employees, and Combustion Engineering, all divisions and subsidiaries, and all officers, agents, and employees, purports to provide that Smith, Western Reserve Group, and Combustion Engineering "fully and forever release[ ] and discharge[ ] [the other party] from all liabilities, claims, and causes of action of every kind in any way arising out of the dispute."[10] The release also provided that Smith pay $25,000.00 to Combustion Engineering.

The Court finds the Settlement Agreement and Mutual Release is not ambiguous on its face and does not raise any problems of interpretation. This particular type of release, however, is not valid in Ohio: "A release, the consideration of which, in whole or in part, is the suppression of criminal prosecution, is void because of a

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[9] The Court notes that there has been some controversy between the parties as to the production by the defendants of certain documents relating to Niam Investigations. The Court has examined the documents submitted for *in camera* inspection, and concludes they are not pertinent to the issue of whether the release is valid.

[10] The term "dispute," by the terms of the Settlement Agreement and Mutual Release, refers to the operations of Western Reserve Group during the period from April of 1980 to January 13, 1984, as well as the allegations contained in the criminal indictment against Smith and Western Reserve Group.

lack of consideration. (*Insurance Co. v. Hull*, [1894], 51 Ohio St. 270, applied.)" *Brown v. Best Products Co.*, 18 Ohio St. 3d 32, 32, 479 N.E.2d 852, 855 (1985). In *Brown*, the plaintiff's employer pressed charges against the plaintiff for theft in municipal court. Before a decision was reached in the case, the parties informed the prosecutor that an agreement had been reached and the prosecutor moved to dismiss the charges. The plaintiff then signed a release form purporting to release the employer from any civil liability arising out of the criminal charges. The plaintiff subsequently filed a civil suit against the employer alleging various tort claims. The employer-defendant raised the release as a defense to the plaintiff's claims. The trial court found the release void, and the Court of Appeals affirmed. The Ohio Supreme Court affirmed, holding that a release supported to any extent by consideration based on the suppression or dismissal of criminal prosecution is void because "[t]he threat of criminal sanctions places the party releasing in a state of apprehension which interferes with his legal capacity to enter into an agreement . . ." and because there is in actuality no consideration supporting the agreement because "[t]he decision to pursue or drop criminal charges is vested in the state." *Id.* at 34-35, 479 N.E.2d at 855.

The release agreement signed by Smith, Western Reserve Group, and Combustion Engineering was at least partially supported by consideration consisting of the dismissal of the criminal charges. In the transcript of the proceedings at which Smith entered his guilty plea with the common pleas court, pursuant to the plea arrangement, the prosecutor stated: "It is my understanding that both parties have executed and as part of the plea bargaining there was a Settlement

Agreement and Mutual Release signed by the respective parties. . . ." Defendants' Exhibit B at 7-8. By its own terms, the settlement agreement and mutual release resolved the "dispute" that included the criminal charges. The release entered into between Smith, Western Reserve Group, and Combustion Engineering was intimately related to the prosecution of criminal charges against the plaintiffs. As a result, the release is invalid under Ohio law. Accordingly, the defendants' motion for summary judgment is denied.

3. *Defendants' Motion for Sanctions.*

The defendants have also filed a motion for sanctions pursuant to Rule 11. Due to the uncertainty in the law regarding the appropriate statute of limitations in §1983 cases and the retroactive application at the time the plaintiffs filed their lawsuit, the Court denies the defendants' motion for sanctions.

III. CONCLUSION

For the reasons stated above, the Court grants the defendants' motion to dismiss Count I of the plaintiffs' complaint. In addition, the Court denies the defendants' motion for summary judgment with respect to Counts II and III of the plaintiffs' complaint.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT JUDGMENT ENTRY

(Filed February 19, 1986)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the defendants' motion to dismiss Count I of the plaintiffs' complaint is granted. The defendants' motion for summary judgment with respect to Counts II and III of the plaintiffs' complaint is denied.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT ORDER

(Filed July 29, 1986)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

ORDER

Before the Court is the motion of the plaintiffs, Lester W. Smith and Western Reserve Group, Inc., for reconsideration of the Court's memorandum opinion and judgment entry filed February 19, 1986 dismissing Count I of the plaintiffs' complaint. The defendants have responded. For the reasons that follow, the motion is denied.

In their complaint, the plaintiffs have alleged a violation of 42 U.S.C. §1983 and violations of §§1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2 (1982) and the antitrust laws of the United States. The plaintiffs have requested the Court to reconsider its decision dismissing the §1983 claim. In the §1983 claim, the plaintiffs allege that the defendants conspired with the County Prosecutor and the Sheriff's Department to conduct an illegal search of the plaintiff's residence in violation of the fourth amendment.

In the opinion filed on February 19, 1986, the Court dismissed the §1983 claim, holding that it is time barred by the statute of limitations. In *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), the Supreme Court determined that "section 1983 claims are best characterized as personal injury actions . . ." and held that the state statute of limitations for personal injuries in tort should govern §1983 actions. *Id.* at 1948-49. Interpreting *Wilson v. Garcia*, the Sixth Circuit, in *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3808 (U.S. June 9, 1986), held that Ohio's one-year statute of limitations for tort actions based on libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice is the appropriate limitations period to apply in §1983 actions. *Id.* at 344. The Sixth Circuit also determined that courts should apply the holding in *Wilson v. Garcia* should be applied retroactively to cases filed before the date of that decision. *Id.* This Court observed that the actions forming the basis of the plaintiffs' §1983 claim occurred on December 8, 1981 and that the plaintiffs filed this action nearly four years after the allegedly illegal conduct occurred, and thus held that the plaintiffs' §1983 claim was time barred.

In their motion, the plaintiffs argue that the Sixth Circuit decision in *Mulligan* was wrongly decided, and point to decisions by other circuit courts they claim are better reasoned and comport more closely with the intent of *Wilson v. Garcia*. Notwithstanding contrary decisions in other circuits, the law in the Sixth Circuit, at least for those district courts located within the boundaries of Ohio, is controlled by *Mulligan*. District courts must follow clearly established circuit law. The Sixth Circuit has not reversed *Mulligan*, and the Supreme Court has

denied certiorari in the case. Despite Justice White's dissent from the denial of certiorari, joined by Justice Marshall, *Mulligan* remains good law in the Sixth Circuit.

The plaintiffs further argue that the defendants' actions constitute a continuing violation and that the continuing violation renders the §1983 claim timely. The Court concludes that the actions complained of by the plaintiffs do not constitute a continuing violation. The conduct that forms the basis of the §1983 claim was a discreet incident that occurred on December 8, 1981—the search and seizure of the plaintiffs' property. The effects of that isolated incident do not constitute a continuing violation for the purposes of tolling the running of the statute of limitations.

For the foregoing reasons, the Court declines to reconsider its earlier decision. The plaintiffs' motion is denied. The Court will hold in abeyance the defendants' conditional motion for reconsideration of the Court's February 19, 1986 decision with regard to Counts II and III of the plaintiffs' complaint.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT MEMORANDUM OPINION

(Filed January 21, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

Presently before the Court is the motion of defendants Combustion Engineering, Inc., C-E Cast Equipment, James F. Calvert, George E. Fisher, Jr., Edwin M. Kavanagh, James B. Kelly, James E. Klima, Thomas E. McGronahan, William F. Roche, and Arthur J. Santry, Jr., hereafter referred to as related defendants, for summary judgment on Counts II and III of plaintiff's complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure. The related defendants seek summary judgment in this antitrust action asserting that their conduct, which forms the basis for plaintiffs' Smith and Western Reserve Group, Inc. complaint, is protected under the *Noerr-Pennington* doctrine. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). For the factual

background in this action, see this Court's prior Memorandum Opinion of February 19, 1986 (Docket Entry 52).

As an initial matter, plaintiffs assert that the related defendants waived the defense of the *Noerr-Pennington* doctrine by failing to include it in their motion to dismiss, their answers, or their initial motion for summary judgment. Although Fed. R. Civ. P. 8 requires a defendant to "affirmatively" plead all affirmative defenses, and Fed. R. Civ. P. 12 provides that a party waives all defenses not raised in a motion to dismiss, exceptions to these rules exist. One exception is that a party may only waive an affirmative defense by express waiver.[1] *See Lesher v. Laurich*, 784 F.2d 193, 195 (6th Cir. 1986). Additionally, the rules relating to amendment of pleadings are designed to allow for liberal amendment. *See Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 106 F.R.D. 521 (E.D. Mich. 1985). Although the related defendants here have not sought leave to amend their answer, no express waiver of the affirmative defense under the *Noerr-Pennington* doctrine has been made. Thus, the Court does not consider the defense waived.

This is not to say that the Court condones the failure to plead or assert the defense at an earlier time. Indeed, had the related defendants raised the issue earlier, it could have been considered with their previous motion and thus saved the Court the expense of reviewing the record an additional time at this later date.

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[1] Invocation of the *Noerr-Pennington* doctrine has been characterized as an affirmative defense. *See Hospital Bldg. Co. v. Trustees of Rex Hospital*, 791 F.2d 288, 292 (4th Cir. 1986); *In Re Wheel Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305, 1309 n.3 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 2275 (1986).

In response to the motion of the related defendants for summary judgment, the plaintiffs assert that material issues of fact exist as to the relevant product market, the legitimacy of plaintiff Western Reserve Group, Inc., as a competitor of C-E Cast Equipment, the availiability of C-E Cast detailed drawings, the extent of the conspiracy between defendants and unnamed co-conspiractors; alleged abuse of process by the defendants, and the applicability of the sham exception to the *Noerr-Pennington* doctrine.

Summary Judgment is appropriate only where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits. . . .show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. In ruling on a motion for summary judgment, the Court must view the facts as alleged in the light most favorable to the party opposing the motion. *United States v. Diebold*, 365 U.S. 654, 655 (1962). The Court may not decide factual issues in dispute and must deny the motion for summary judgment if material issues of fact are in dispute.

Concerning plaintiffs' allegations as to the relevant product market, the plaintiffs assert that the relevant product market in dispute is the market for "replacement," "wear," or "spare" parts. The related defendants submit that the relevant market is the market for "make" parts. The related defendants define "make" parts as those parts which can only be made with their detailed specifications. These defendants assert that the specifications of make parts are not available to the public and are only given to their customers in exigent circumstances. Even assuming that the relevant product market is the replacement parts market and that Western Reserve Group, Inc., is a legitimate competitor of defendant C-E Cast, the Court

finds that no *material* issue of fact exists concerning the application of the product market here to the defendants' defense under the *Noerr-Pennington* doctrine.

A review of the record shows that any harm that resulted to plaintiffs as a legitimate competitor at C-E Cast stemmed from the investigation, search and prosecution of plaintiffs. The investigation, search and prosecution was a result of C-E Cast's desire to protect what it, rightly or wrongly, believed to be its own product or trade secret. The *Noerr-Pennington* doctrine immunizes from antitrust liability attempts to influence the legislative process, administrative agencies or the courts. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Thus, the actions of the related defendants here are precisely those which fall under the *Noerr-Pennington* doctrine. For those reasons, the Court does not believe that questions concerning the legitimacy of defendant Western Reserve Group, Inc. as a competitor of C-E Cast and the availability of C-E Cast's drawing raise an issue of material fact. As to plaintiff's claims of conspiracy between the defendants and unnamed co-conspirators, the plaintiff has alleged no set of facts that would remove the defendants' conduct from the shield of the *Noerr-Pennington* doctrine.

Plaintiffs' claim of abuse of process and the application of the sham exception to the *Noerr-Pennington* doctrine raises more difficult questions. Although normally such issues could only be resolved at trial, the Court feels that in the context of the unique factual background of this case, these questions do not raise an issue of material fact. As noted in this Court's previous opinion, plaintiffs plead guilty to criminal charges arising out of the prosecution in the Cuyahoga County, Ohio, Court of Common Pleas. Thus, plaintiffs' allegations that defendants' investigation and prosecution constituted a "sham" cannot withstand

scrutiny by the "very fact that [the position of the related defendants'] prevailed." *Potters Medical Center v. City Hospital Ass'n.*, 800 F.2d 568, 578 (6th Cir. 1986) and cases cited therein. For these same reasons, plaintiffs' claims of abuse of process must fail. The conduct of the related defendants did not constitute a "baseless" decision to prosecute. *California Motor Transport, supra.*

> Without a doubt, the intention to harm a competitor is not sufficient to make litigation or administrative proceedings a sham. The anticompetitive motive is the very matter protected under *Noerr-Pennington.* Rather, the requisite motive for the sham exception is the intent to harm one's competitors not by the result of the litigation but by the simple fact of the institution of litigation."

Potters, 800 F.2d at 579, quoting *MCI Communications Corp. v. American Telephone & Telegraph Co.,* 708 F.2d 1081, 1156 (7th Cir. 1983), *cert. denied* 464 U.S. 891 (1983). Here the related defendants pursued their prosecution until the plaintiffs had plead guilty to the criminal charges and until the parties had agreed on other additional terms. Such facts do not reasonably support the conclusion that the defendants sought to harm the plaintiffs by the mere "institution of litigation."

The Court believes that there are no material issues of fact in dispute and that the related defendants are entitled to judgment as a matter of law. Therefore, it is ordered that the motion of the related defendants for summary judgment is granted.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT JUDGMENT ENTRY

(Filed January 21, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the Court grants summary judgment as to Counts II and III of plaintiff's complaint in favor of defendants Combustion Engineering, Inc., C-E Cast Equipment, James F. Calvert, George E. Fisher, Jr., Edwin M. Kavanagh, James B. Kelly, James E. Klima, Thomas E. McGronahan, William F. Rouche, and Arthur J. Santry, Jr., against the plaintiffs, Lester W. Smith and Western Reserve Group, Inc. and finds, pursuant to the provisions of Civil Rule 54(B) that there is no just reason for delay in that this judgment concludes the plaintiffs' case against ten of the eleven defendants in that summary judgment as to Count I of the plaintiffs' complaint was previously granted to the said ten defendants by the Court's order of February 18, 1986.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT MEMORANDUM OPINION

(Filed March 24, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

Before the Court is a motion for summary judgment (docket #99), filed January 22, 1987 by Lawrence K. Hubbel, the only remaining defendant in this case, the Court having entered summary judgment in favor of the other ten defendants. The defendant Hubbel moves for summary judgment only as to Count I of the plaintiffs' complaint. Count I alleges a cause of action under 42 U.S.C. §1983. Counts II and III allege antitrust law violations against all the defendants, including the defendant Hubbel. The defendant Hubbel has not moved for summary judgment as to Counts II and III.

Defendant Hubbel's motion for summary judgment on the §1983 count is premised upon the bar of the appropriate statute of limitations. As the Court has earlier noted in this case, the Sixth Circuit Court of

Appeals has adopted a one-year statute of limitations for §1983 actions brought in Ohio. *Mulligan v. Hazard,* 777 F.2d 340 (6th Cir. 1985). In plaintiffs' response to defendant Hubbel's motion for summary judgment (docket #101), plaintiffs have conceded that the latest possible determinative date for statute of limitations purposes is January 13, 1984. *See* plaintiffs' response at pp. 4-5. Plaintiffs did not file their complaint until November 18, 1985, some 22 months later. Accordingly, the Court concludes that the plaintiffs' §1983 claims against the defendant Hubbel are barred by the one-year statute of limitations. The Court therefore sustains the motion for summary judgment as to Count I (docket #99).

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT JUDGMENT ENTRY

(Filed March 24, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that summary judgment is entered in favor of the defendant, Lawrence K. Hubbel, on Count I of the plaintiffs' complaint alleging a cause of action under 42 U.S.C. §1983.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

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DISTRICT COURT ORDER

(Filed March 24, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

ORDER

Before the Court is the plaintiffs' request for reconsideration of the Memorandum Opinion and Judgment Entry (1-21-87) dismissing second and third counts (antitrust) (docket #100). On February 12, 1987, a response was filed on behalf of the defendants Combustion Engineering, Inc., its division C-E Cast Equipment, James F. Calvert, George E. Fisher, Jr., Edwin M. Kavanagh, James B. Kelly, James E. Klima, Thomas E. McGranahan, William F. Roche, and Arthur J. Santry, Jr. (the Combustion Engineering defendants). In further support of their request, the plaintiffs mailed a letter to the Court on March 1, 1987 which the Court filed and docketed on March 2, 1987 (docket #103). Finally, the Court has before it a responsive letter from Walter A. Bates, counsel for the Combustion Engineering defendants, dated March 12, 1987 (docket #104).

In the Memorandum Opinion that is the subject of the present request for reconsideration, the Court expressed its view that the "*Noerr-Pennington* doctrine" immunized the defendants' alleged conduct from antitrust scrutiny. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The doctrine generally insulates from antitrust scrutiny the use of the court processes. The Court in that memorandum opinion also rejected the plaintiffs' argument that the "sham exception" to the *Noerr-Pennington* doctrine applied in this case. The sham exception to *Noerr-Pennington* is triggered by conduct amounting to malicious prosecution and/or abuse of process. In its earlier memorandum opinion, the Court reasoned that since the plaintiffs had pled guilty to lesser offenses in order to end the prosecution which was brought by the state of Ohio, the prosecution could not be said to be a sham.[1]

In requesting reconsideration, plaintiffs argue that their guilty pleas were coerced by such factors as the length of the prosecution, financial hardship, and humiliation and embarrassment. As the Court interprets it, plaintiffs' position seems to be that the Court should not have treated the guilty pleas as valid since they were allegedly coerced in one way or another.

The Court concludes that plaintiffs are essentially asking the Court to set aside their guilty pleas, something which the Court has no power to do. The plaintiffs instead must pursue such relief through post-conviction procedures in the state court system. Since

[1] The Court also notes that plaintiffs in the earlier state proceeding were indicted by a grand jury of their peers, and were represented by counsel throughout the criminal proceedings.

plaintiffs have not chosen that route, this Court will consider the guilty pleas to be valid. The plaintiffs' request for reconsideration is denied.

In conclusion, the request for reconsideration of the memorandum opinion and judgment entry (1-21-87) dismissing second and third counts (antitrust) (docket #100) is denied.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT ORDER

(Filed March 24, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

ORDER

In light of the fact that the Court has granted summary judgment to all defendants on the plaintiffs' claims under 42 U.S.C. §1983, and in light of the fact that the Court has granted summary judgment on Counts II and III of the complaint in favor of all defendants except for Lawrence K. Hubbel and has denied the plaintiffs' request for reconsideration of that decision, plaintiffs are hereby given leave until April 20, 1987 to file a brief and any appropriate supporting papers showing why the Court should not also grant summary judgment in favor of the defendant Lawrence K. Hubbel on Counts II and III of plaintiffs' complaint. *See Kistner v. Califano,* 579 F.2d 1004, 1006 (6th Cir. 1978). The defendant Hubbel shall then have until April 27, 1987 to file a response if he chooses to do so.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT MEMORANDUM OPINION

(Filed June 10, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

On January 21, 1987 the Court granted summary judgment to the ten related defendants[1] on the antitrust counts (counts II and III) of the plaintiffs' complaint, on the basis of the *Noerr-Pennington* doctrine. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). On March 24, 1987 the Court denied the plaintiffs' motion for reconsideration of the January 21, 1987 ruling, and the Court also gave plaintiffs leave to file a brief and supporting papers showing why the Court should not also grant summary judgment in favor of the only remaining defendant in

[1] The "related defendants" are Combustion Engineering, Inc., C-E Cast Equipment, James F. Calvert, George E. Fisher, Jr., Edwin M. Kavanagh, James B. Kelly, James E. Klima, Thomas E. McGronahan, William F. Roche, and Arthur J. Santry, Jr.

this case, Lawrence K. Hubbel, on counts II and III of the plaintiffs' complaint. The defendant Hubbel has not himself filed a motion for summary judgment as to Counts II and III.

Presently before the Court is the plaintiffs' response to the Court's order of March 24, 1987.[2] Having considered the plaintiffs' response and supporting materials, the Court concludes that summary judgment is warranted in favor of the defendant Hubbel on counts II and III of the plaintiffs' complaint.

At page 37 and 38 of the plaintiffs' response, the plaintiffs state as follows:

> The genuine issue of material fact with respect to defendant Hubbel (and the other 10 related defendants) is whether he conspired with others for the purpose of eliminating Western Reserve Group, Inc., and Lester W. Smith as competitors of Combustion Engineering. It is undisputed and supported by evidence the defendant Hubbel conspired, and indeed, had a cooperative relationship with Kavanagh. The purpose, reason, motive, or justification of the activities between Kavanagh, Niam and Hubbel is a question of fact.
>
> If the activities were for an improper purpose, as plaintiffs allege, the *Noerr-Pennington* immunity is not available to any of the defendants.

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[2] Although given leave to do so, and although the Court further granted him an extension of time in which to do so, the defendant Hubbel has not filed anything with the Court by way of a response to the plaintiffs' response to the Court's order. Although it happens that the plaintiffs have not altered the Court's view that summary judgment on the antitrust counts is warranted in favor of the defendant Hubbel, the Court does not look with favor upon the defendant Hubbel's failure to assist the Court, especially in light of the fact that the defendant Hubbel requested and was granted an extension of time in which to file appropriate papers.

It appears to the Court that the plaintiffs present the same argument on behalf of the defendant Hubbel as they presented earlier on behalf of the other ten defendants. Accordingly, the Court holds to its view that the *Noerr-Pennington* doctrine applies to bar the antitrust counts against the defendant Hubbel.

Although defendant Hubbel has not filed a motion, the Court has determined to enter summary judgment *sua sponte,* having now given the plaintiffs notice of its intent to do so and an opportunity to respond. *See Kistner v. Califano,* 579 F.2d 1004, 1006 (6th Cir. 1978). *See also Celotex Corp. v. Catrett,* 106 S. Ct. 2548, 2554 (1986), where the Supreme Court of the United States noted "that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte,* so long as the losing party was on notice that she had to come forward with all of her evidence" (citations omitted).

For the foregoing reasons, the Court entered summary judgment in favor of the defendant Lawrence K. Hubbel on count II and count III of the plaintiffs' complaint.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT JUDGMENT ENTRY

(Filed June 10, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that summary judgment is entered in favor of the defendant Lawrence K. Hubbel on count II and count III of the plaintiffs' complaint.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

DISTRICT COURT ORDER

(Filed July 24, 1987)

Case No. C85-3451A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

ORDER

Before the Court is a pleading styled "combined motions for (i) FRAP 4(a)(5) extension of time and (ii) FRCP 60(b) relief from judgment," filed by the plaintiffs in the above-captioned case. The Combustion Engineering defendants have filed a response to the motions. For the reasons that follow, the Court overrules the plaintiffs' combined motions.

The plaintiffs' motion for an extension of time for filing a notice of appeal is overruled as moot because the plaintiffs have since proceeded to file their notice of appeal.

In the Rule 60(b) motion, the plaintiffs seek relief from the Court's entry of summary judgment for the defendant Hubbel on June 10, 1987, on the plaintiffs' antitrust claims. The plaintiffs do not address their

motion to a similar court ruling concerning the ten Combustion Engineering defendants, which ruling was already on appeal when the plaintiffs filed the present motion. Although the defendant Hubbel has not responded to the motion, the Combustion Engineering defendants have filed a response upon leave of Court.

In support of their Rule 60(b) motion, the plaintiffs attach what appears to be a copy of a judgment of expungement of conviction dated May 18, 1987. Plaintiffs advance the theory that the expungement undercuts the Court's reasoning that the plaintiffs' antitrust claims are barred by the *Noerr-Pennington* doctrine. The Court disagrees. First, as the Combustion Engineering defendants point out, only the conviction of Lester Smith, and not the conviction of the plaintiff Western Reserve Group, was expunged. Secondly, while Ohio Rev. Code §2953.32(C)(2) provides that an expunged conviction will "be deemed not to have occurred," the Court agrees with the Combustion Engineering defendants that the plaintiffs are attempting here to use the expungement in a manner contrary to the statutory purpose of the expungement procedure. The Court agrees with the following reasoning presented by the Combustion Engineering defendants at page 7 of their response to the plaintiffs' motions:

> Plaintiffs' attempt to use the expungement of Lester Smith's conviction in this manner is completely contrary to the purposes of the expungement statute. The Ohio General Assembly enacted that legislation to permit a rehabilitated first-time offender to clear his record after he has paid his debt to society. Section 2953.32 was not intended to be used by an offender as a sword to retaliate against the individuals who brought him to justice.

In conclusion, for the reasons stated above, the plaintiffs' combined motions for (i) FRAP 4(a)(5) extension of time and (ii) FRCP 60(b) relief from judgment (docket #120) are overruled.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
U. S. District Judge

ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed October 12, 1988)

No. 87-3378/3657

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LESTER W. SMITH, *et al.*,
Plaintiffs-Appellants,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants (87-3657),

LAWRENCE K. HUBEEL,
Defendant-Appellee (87-3657),

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants-Appellees (87-3378).

ORDER

BEFORE: LIVELY, MERRITT and KRUPANSKY, *Circuit Judges.*

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petitition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

/s/ LEONARD GREEN, *Clerk*

ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CONSOLIDATING APPEALS NOS. 87-3378, 87-3657 and 87-3761

(Filed November 9, 1987)

Nos. 87- 3378
87-3657
87-3761

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LESTER W. SMITH, *et al.*,
Plaintiffs-Appellants,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants-Appellees (87-3378/87-3761)
Defendants (87-3657),

LAWRENCE K. HUBBEL,
Defendant-Appellee.

ORDER

Upon consideration of the appellee, Lawrence K. Hubbel's motion to consolidate the above-styled cases for submission, and to adopt the appellees' brief for case numbered 87-3657,

IT IS ORDERED that the motion to consolidate be, and it hereby is, GRANTED. Hubbel may adopt appellees' briefs filed in the consolidated cases.

ENTERED PURSUANT TO RULE 8(b)
SIXTH CIRCUIT RULES

JOHN P. HEHMAN, *Clerk*
/s/ JOHN P. HEHMAN

ORDER OF THE COURT OF APPEALS OF THE SIXTH CIRCUIT DISMISSING APPEAL NO. 87-3761

(Filed April 11, 1988)

87-3378; 87-3657; 87-3761

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LESTER W. SMITH,
WESTERN RESERVE GROUP, INC.,
Plaintiffs-Appellants,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants-Appellees.

ORDER

Before: KEITH and NORRIS, *Circuit Judges;* and EDWARDS, *Senior Circuit Judge.*

The plaintiffs have filed a total of three notices of appeal in this civil rights and antitrust action. These appeals were consolidated by this Court by order dated November 9, 1987. Ten of the eleven named defendants now move to dismiss appeal No. 87-3761 as to those ten defendants, or in the alternative, to dismiss appeal No. 87-3761 *in toto* for lack of appellate jurisdiction. The plaintiffs oppose the motion.

The plaintiffs' complaint alleged claims against each of eleven named defendants and three unnamed defendants under 42 U.S.C. §1983 and 15 U.S.C. §§1, 2. Ten of the named defendants are Combustion Engineering, Inc., C-E Equipment (a division of Combustion Engineering), and eight past or present officers or employees of those corporations. The claims against the Combustion Engineering defendants have been adjudicated jointly throughout this litigation. The claims against the remaining named defendant, Lawrence K. Hubbel, have been adjudicated separately.

The plaintiffs instituted this action on November 18, 1985. Judgment was entered for the Combustion Engineering defendants by orders dated February 19, 1986 and March 24, 1986. The March 24 order disposed of all counts alleged against the Combustion Engineering defendants and was certified for interlocutory appeal pursuant to Rule 54(b), Federal Rules of Civil Procedure. The plaintiffs' motion for reconsideration was denied on March 24, 1987 and plaintiffs filed a timely notice of appeal which has been docketed as No. 87-3378.

Summary judgment was entered for defendant Hubbel on the civil rights counts on March 24, 1987 and on the antitrust counts on June 10, 1987. The plaintiffs filed motions to extend the time for appeal pursuant to Rule 4(a)(5), Federal Rules of Appellate Procedure, and for relief from judgment pursuant to Rule 60(b), Federal Rules of Civil Procedure. Prior to the district court's disposition of these motions, plaintiffs filed a notice of appeal which has been docketed as No. 87-3657. Thereafter, on July 24, 1987, the district court entered an order overruling plaintiffs' 4(a)(5) motion as moot and overruling the 60(b) motion on the merits. The plaintiffs filed a notice of appeal from that order on August 5,

1987. This appeal has been docketed as No. 87-3761. The Combustion Engineering defendants now move to dismiss appeal No. 87-3761.

The filing of a notice of appeal divests the district court of jurisdiction and transfers jurisdiction to the court of appeals, *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 641 n.10 (6th Cir. 1982); *Cochran v. Birkel*, 651 F.2d 1219, 1221 (6th Cir. 1981); *First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343 (6th Cir. 1976) (per curiam). The district court retains jurisdiction only to proceed with matters that are in aid of the appeal. *Cochran v. Birkel*, 651 F.2d at 1221-23 (where appeal is taken from a clearly nonappealable order); *Jago v. United States District Court*, 570 F.2d 618, 619-22 (6th Cir. 1978); *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d at 641, n.10. Once jurisdiction has transferred to the appellate court, if the district judge is disposed to grant a 60(b) motion that has been filed with the district court, he may enter an order so certifying. The party may then file with this Court a motion to remand. *First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d at 345-46. Absent remand by the appellate court, a district court is without jurisdiction and may not decide a 60(b) motion after the notice of appeal has been filed. *S & E Shipping*, 67 F.2d at 641-42, n.10; *Gould v. Mutual Insurance Co.*, 790 F.2d 769 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 580 (1986).

In the present case, the order of June 10, 1987 adjudicated all matters alleged in the plaintiffs' complaint. The timely notice of appeal filed on July 8, 1987, divested the district court of jurisdiction in this case. As the district court did not certify an intent to grant plaintiffs' 60(b) motion under *Hirsch*, jurisdiction has remained with this Court since the filing of the

second notice of appeal and the district court was without jurisdiction to enter the orders appealed from in appeal III. Accordingly,

It is ORDERED that appeal No. 87-3761 is dismissed for lack of appellate jurisdiction.

ENTERED BY ORDER OF
THE COURT
/s/ JOHN P. HEHMAN, *Clerk*

CALENDAR COORDINATOR, COURT OF APPEALS FOR THE SIXTH CIRCUIT, LETTER DATED MAY 26, 1988, SETTING ORAL ARGUMENT FOR APPEALS NOS. 87-3378 AND 87-3657 WITH LEAVE TO FILE UPDATE CITATIONS

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
U.S. Post Office & Courthouse Building
Cincinnati, Ohio 45202-3988

JOHN P. HEHMAN
CLERK

Telephone
(513) 684-2953
FTS 684-2953

LEONARD GREEN
CHIEF DEPUTY

IMPORTANT NOTICE

May 26, 1988

Mr. Mack D. Cook, II
Ms. Edna R. Hazelett-Cook

Mr. Walter A. Bates

Re: Case No. 87-3378/3657
Lester W. Smith, et al. v. Combustion Engineering, Inc., et al.

This is notice that this case is scheduled to be argued on **Friday, July 29, 1988** in Cincinnati. You should report to room 524, U.S. Post Office Building, 5th and Walnut Streets, no later than **8:30 a.m.** Court will convene at **9:00 a.m.**, Eastern Daylight Saving Time. Oral argument will be limited to 15 minutes per side.

Please complete the following immediately:

(1) Return our enclosed self-addressed postcard indicating the name of counsel who will present oral argument. Only one counsel per side is

ordinarily permitted to argue. In criminal cases, one counsel for each defendant may argue but counsel must divide the time for their side. In civil cases, where the parties on one side are adverse, more than one counsel may argue but the time per side must be divided.

(2) If this is a civil case you may submit to us within the next seven days a list of citations updating your briefs (original and three copies). Each citation should include a one-line statement of the subject matter of the case and a reference to the issue number to which the citation relates.

(3) Inform us if you have knowledge of the same or similar issues before the court in any other pending cases.

Very truly yours,

/s/ MARJORIE I. ELIASEN
Marjorie Eliasen
Calendar Coordinator

sdl

Enclosure

pc: Mr. William A. Hamann, Jr.
Mr. James J. Dyson

ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING REQUEST FOR ADDITIONAL TIME FOR ORAL ARGUMENT OF APPEALS NOS. 87-3378 and 87-3657

(Filed June 9, 1988)

Nos. 87-3378
87-3657

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LESTER W. SMITH, *et al.*,
Plaintiffs-Appellants,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants-Appellees.

ORDER

Upon consideration of the plaintiffs-appellants' letter requesting additional time for oral argument, and the defendants-appellees' response in opposition thereto,

IT IS ORDERED that the request be, and it hereby is, DENIED.

ENTERED BY ORDER
OF THE COURT

JOHN P. HEHMAN, Clerk
/s/ JOHN P. HEHMAN

ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed July 27, 1988)

Nos. 87-3378
87-3657

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LESTER W. SMITH, *et al.*,
Plaintiffs-Appellants,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants-Appellees (88-3378),
Defendants (88-3657),

LAWRENCE K. HUBBEL,
Defendant-Appellee (87-3657).

ORDER

Upon consideration of the appellants' motion to submit for filing additional citations construed as a supplemental brief,

IT IS ORDERED that the motion be, and it hereby is, DENIED, and appellants' additional citations may be filed, but not as a supplemental brief.

ENTERED BY ORDER
OF THE COURT

LEONARD GREEN, Clerk
/s/ LEONARD L. GREEN/LW

PETITIONERS' STATEMENT OF ISSUES PRESENTED FOR REVIEW, COURT OF APPEALS FOR THE SIXTH CIRCUIT, APPEAL NO. 87-3378

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN GRANTING NOERR-PENNINGTON IMMUNITY FOR ALL ANTITRUST VIOLATIONS CLAIMED IN COUNTS II AND III AND IN FAILING TO CONSIDER FACTS RELEVANT TO THE SHAM EXCEPTION UNDER THE NOERR-PENNINGTON DOCTRINE FOR ONE VIOLATION.

II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING SUMMARY JUDGMENT ON THE BASIS OF AN AFFIRMATIVE DEFENSE THAT WAS WAIVED.

III. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY ENTERING A SUA SPONTE MOTION FOR SUMMARY JUDGMENT.

IV. WHETHER THE DISTRICT COURT WAS COMPELLED TO DISMISS SECTION 1983 COUNT I OF THE COMPLAINT BECAUSE OF A TIME BAR.

PETITIONERS' STATEMENT OF ISSUES PRESENTED FOR REVIEW, COURT OF APPEALS FOR THE SIXTH CIRCUIT, APPEAL NO. 87-3657

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER DEFENDANT HUBBELL, RUNNING A MACHINE SHOP BUSINESS, MAY BE FOREVER IMMUNIZED BY THE DISTRICT COURT FOR ANTITRUST LIABILITY BY A RULE 56 SUMMARY JUDGMENT.

II. WHETHER A RESPONSE ORDERED BY THE DISTRICT COURT ENABLED PLAINTIFFS TO MAKE A SUFFICIENT FACTUAL SHOWING OF THE EXISTENCE OF ESSENTIAL ELEMENTS IN EACH OF THEIR ANTITRUST CLAIMS AGAINST DEFENDANT HUBBELL TO GAIN A TRIAL ON THE MERITS.

III. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY ENTERING SUA SPONTE A MOTION FOR SUMMARY JUDGMENT.

STATE COURT JUDGMENT OF EXPUNGEMENT

(Dated May 18, 1987)

Case No. CR-171358

IN THE COURT OF COMMON PLEAS
CUYHOGA COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

vs.

LESTER W. SMITH,
Defendant.

JOURNAL ENTRY

JUDGMENT OF EXPUNGEMENT OF CONVICTION

ORDER TO SEAL RECORDS

This matter came on to be heard upon the Application for Expungement of the applicant's conviction.

The Court has given notice to the Prosecutor for the case and the Probation Department and a report has been received from the Probation Department as to the defendant.

The Court has considered the evidence and the reasons against granting the application specified in the objection, if any, filed by the Prosecutor.

The Court determines that the applicant's conviction was not one for which the applicant was not eligible for probation, nor a conviction under Chapter 4507 of the

Ohio Revised Code, and that the applicant was in fact eligible for probation; that the applicant is a first offender and that three years have expired after the applicant's final discharge if the applicant was convicted of a felony or that one year has expired after the applicant's final discharge if the applicant was conficted of a misdemeanor; that no criminal proceedings are pending against the applicant; that the applicant's rehabilitation has been attained to the satisfaction of the Court; that the interests of the applicant in having the records pertaining to the applicant's conviction sealed are not outweighed by any legitimate needs of the government to maintain those records; and that the applicant, unless indigent, has paid a fifty dollar ($50.00) filing fee.

THEREFORE, IT IS HEREBY ORDERED that all official records pertaining to this case shall be sealed, that, except as provided in Ohio Revised Code Section 2953.32(F), all index references to this case shall be deleted, that the proceedings in this case shall be deemed not to have occurred, and that the applicant's conviction shall be sealed, except that upon conviction of a subsequent offense, the sealed record of prior conviction may be considered by the Court in determining the sentence or other appropriate disposition, including the relief provided for in Section 2953.31 to 2953.32 of the Revised Code.

IT IS FURTHER ORDERED that the applicant be and is hereby restored to all rights and privileges not otherwise restored by termination of sentence or probation or by final release on parole.

IT IS FURTHER ORDERED that the Clerk of Court of Common Pleas shall serve certified copies of this Journal Entry by certified mail, return receipt requested upon the following:

(1) The law enforcement official in charge of the law enforcement agency or organization which caused the applicant's arrest, applicant to submit to the Clerk of Court of Common Pleas in writing the name and address of said agency or organization, together with applicant's birth date and Social Security Number;

(2) The Prosecuting Attorney of Cuyahoga County, Ohio;

(3) The Adult Probation Department of this Court;

(4) The Bureau of Criminal Investigation in the office of the Attorney General of the State of Ohio, applicant to submit to the Clerk of Court of Common Pleas in writing applicant's birth date and Social Security Number;

(5) The Cuyahoga Regional Information System (CRIS);

(6) The Cuyahoga County Data Center; and

(7) The Cuyahoga County Sheriff's Department.

IT IS FURTHER AND FINALLY ORDERED that none of the foregoing persons, agencies, or organizations shall inspect or use said records, nor permit the inspection or use of said records except in accordance with the applicable provisions of Ohio Revised Code Sections 2953.53 and 2953.54 as currently enacted or as hereinafter amended.

/s/ DANIEL O. CORRIGAN
Judge

PETITIONERS' SUBMISSION TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT FOR RECONSIDERATION AND REHEARING EN BANC OF APPEALS NOS. 87-3378 AND 87-3657

Rule 14. EN BANC
REQUIRED STATEMENT FOR REHEARING, EN BANC

We express a belief, based on a reasoned and studied professional judgment, that the Panel decision of August 24, 1988, is contrary to the following decisions of the Supreme Court of the United States:

Allied Tube & Conduit Corp. v. Indian Head, Inc., _____ U.S. _____, 100 L.Ed.2d 497, 108 S.Ct. 1931, (1988);

Patrick v. Burget, _____ U.S. _____, 100 L.Ed.2d 83, 108 S.Ct. 1658 (1988);

Vodila v. Clelland, _____ U.S. _____, 97 L.Ed.2d 754, 107 S.Ct. 3255 (1987);

and the following decisions of the United States Court of Appeals for the Sixth Circuit:

Duncan v. Peck, 844 F.2d 1261 (1988);

Gaff v. Federal Deposit Ins. Corp., 828 F.2d 1145 (1987);

Thomas v. Shipka (II), 829 F.2d 570 (1987);

Vodila v. Clelland (II), 836 F.2d 231 (1987);

Westmac, Inc. v. Smith, 797 F.2d 313 (1986),

and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court.

We express a belief, based on a reasoned and studied professional judgment, that this appeal involves questions of exceptional importance:

I. Whether the First Count (designated by the Panel as "Count I, the civil rights claim") asserts as a common nucleus of operative facts: A trespass upon real property; a taking and detaining (conversion) of personal property; and, an injury to civil rights; and whether these wrongs give rise to three sets of claims based on violations of guaranteed liberties: (1) a pendent state law claim [Compl. ¶34]; (2) a federal claim arising under Section 1983 [Compl. ¶35]; and, another federal claim arising under 42 U.S.C. §1988 and the Constitution of the State of Ohio [Compl. ¶44]. The Panel did not answer the Question; the answer should be "Yes."

II. Whether the one year statute of limitations adopted in *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985) for all Section 1983 claims brought in Ohio is to be applied automatically retroactively to all allegations of the First Count without evaluation and consideration of "clear past precedents" prior to December 8, 1982. The Panel did not answer the Question; the answer should be "No."

III. Whether the Supreme Court decisions in *Patrick v. Burget* and *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, narrow and restrict judicially created immunity for anticompetitive conduct so that the dissent in *Westmac, Inc. v. Smith*, 797 F.2d 313, at 320-323, should be adopted so that an abuse of process falls within the sham exception to the *Noerr-Pennington* doctrine defense and the antitrust law Second and Third Counts should not have been dismissed by summary judgment on motion of the Combustion Engineering defendants and sua sponte by the district court for defendant Hubbell. The Panel did not answer this Question; the answer should be "Yes."

IV. Whether an evidentiary rule of the Sixth Circuit adopted in *Duncan v. Peck*, 844 F.2d 1261 (1988), requires that an immunity defense to the Second and

Third Counts be supported by affidavits from defendants or their attorneys that any or all of them were acting in "good faith" when seeking out the participation of "state prosecutor" or "prosecutors office" for actions leading to the destruction of plaintiff and his company as business competitors. The Panel did not answer this Question; the answer should be "Yes."

V. Whether the Panel has failed to understand the factual base, as evidenced by Exh. 2 (App. 122, 123), for the "present effect and therefore continuing violation" alleged in Complaint ¶¶78, 79 and 80 (App. 33, 34), and has misapplied a statement by the Supreme Court in *United Airlines, Inc. v. Evans,* 431 U.S. at 558, (a Title VII present-effects-of-past discrimination case). The answer should be "Yes." Cf., the analysis in *Stewart v. CPC International, Inc.,* 679 F.2d 117, beginning at 120 (7th Cir. 1982).

Relief Requested

En Banc reconsideration of the Order and decision filed August 24, 1988, reversal and setting aside of the rulings by the district court identified in the two Notice of Appeal documents (App. 99-102 and App. 437-439), and remand of the case for a plenary trial on the merits as to all requests and claims in the Complaint, as amended, with such instructions as this Court shall deem necessary and required by all apparent facts of the case.

Respectfully submitted,

/s/ EDNA REBECCA HAZELETT-COOK
/s/ MACK D. COOK, II
Attorneys of record for plaintiffs-appellants
900 First National Tower
Akron, Ohio 44308

PETITION FOR REHEARING

On August 24, 1988, a Panel of this Court, Lively, Merrit and Krupansky, wrote a decision which caused an Order to be entered in favor of all eleven defendants-appellees on all issues in both appeals. There had been no trial or even an evidentiary hearing in the district court. Facts alleged in the Complaint and corroborated by plaintiffs' discovery have not been considered by the Panel. A copy of the seven (7) page decision by the Panel, which confirms judicial immunity for the alleged conspiracies and predatory conduct, is reproduced after the Proof of Service. The decision copy mailed to appellants' counsel bears a stamp "NOT RECOMMENDED FOR FULL-TEXT PUBLICATION."

The Decision of August 24, 1988

Read for result, the decision of the Panel is a blanket confirmation of the thinking of the district court as set forth in eleven documents. (Dkt. Nrs. 52, 53, 81, 97, 98, 105, 106, 107, 108, 118 and 119) originated in a time period beginning 2-19-86 and ending 6-10-87, about 17 months of district court time.

Read for reasoning and logic, the decision keys on but two undisputed facts: Fact 1, a search and seizure by private persons at the home of plaintiff Smith on *12-8-81,* without any official involvement by a state prosecutor or prosecutor's office; Fact 2, an alleged coerced plea bargain guilty plea to a lesser offense of receiving stolen property of a value less than $150.00 on *1-13-84.*

The Panel decision (see Part II) has affirmed the automatic retroactive application of the precedent of *Mulligan v. Hazard,* 777 F.2d 340 (6th Cir. 1985), *cert.*

denied, 476 U.S. 1174 (1986), to dismiss all claims of the First Count of the Complaint because of Fact 1, the search and seizure which had occurred on *12-8-81.*

The Panel (see Part III) has affirmed the dismissal of the separate antitrust counts (the Second and the Third Counts) by application of the precedent of *Potters Medical Center v. City Hospital Assn.,* 800 F.2d 568, 578 (6th Cir. 1986), a case "in which this court had held that a defendant's activities against a competitor could not be considered a sham where the defendant's position prevailed."

The Panel decision indicates approval that the district court had "denied the plaintiffs' contention that the defendants' conduct came within the 'sham exception' to the *Noerr-Pennington* doctrine", by rejecting plaintiffs' argument because "the defendants could [never as a matter of federal law] be found to have fostered a baseless prosecution since they prevailed in their position when the plaintiffs pled guilty."

Prior to hearing on July 29, 1988, a list of citations updating the briefs of appellants was presented to the Panel. This submission was a letter on the stationery of Cook and Cook, addressed to the Court Clerk with the date of July 1, 1988. At hearing, advocate counsel for appellants asked the presiding judge whether the July 1 letter was in the file of each panel member. Counsel was informed that the letter of July 1 was in each file.

Having read the Panel decision, it seems as though the appellants' additional citations though filed (by Order of the Court issued July 27, 1988), were not considered. Therefore, to the extent that further pagination for this pleading permits, reference will now be made to certain of the additional citations. So that the

appeal record will be complete, the entire text of the letter of July 1, 1988, is incorporated herein by general reference.

Discussion as to Questions 1 and 2 and Dismissal of the First Count as Affirmed

Question 1 can be answered "Yes", if reference is made to the current precedent of *Gaff v. Federal Deposit Ins. Corp.*, 828 F.2d 1145, a case in which this Court held that separate claims in a Count must each be evaluated and "expressly addressed," before a dismissal of the entire Count may be reviewed on appeal. *Id.*, at 1151.

The Complaint in this case is clear. A common nucleus of operative facts is alleged describing three types of tortious conduct. These alleged wrongs give rise to three sets of claims based on violations of guaranteed liberties. In the Complaint, paragraph 1, subject matter jurisdiction for the state law claim of ¶34 is created by the pleading of 42 U.S.C. §1332, for the federal law claim under Section 1983 by the conventional pleading of 42 U.S.C. §1343 and for the third claim under 42 U.S.C. §1988 by the pleading of 28 U.S.C. §1331.

The interests of fair administration of federal court justice require that Question 1 be answered by this Court, if for no other reason than to preserve the question presented by blanket dismissal of all claims in the First Count by retroactive application of *Mulligan v. Hazard.*

The proper answer to Question 2, "No", will follow from recognition of the impact of the Supreme Court decision in *Vodila v. Clelland*, (97 L.Ed. 2d 754, 107 S.Ct. 3255) and two follow up decisions by this Court in *Thomas v. Shipka* (II), 829 F.2d 570 and *Vodila v. Clelland* (II), 836 F.2d 231.

Quoting from *Thomas v. Shipka* (II), (829 F.2d at 572, footnote omitted), the *Vodila* court (836 F.2d at 232) observed that the Supreme Court's action "compels the conclusion that the one-year statute of limitations adopted in *Mulligan* for all Section 1983 claims brought in Ohio is *not* to be applied retroactively and that the decision as to retroactivity must be made on a case-by-case basis."

The rationale of *Vodila* (836 F.2d at 232) may be, in fair paraphrase, now presented in argument as follows:

> The most significant question presented in this case, as *Thomas* teaches, is whether the precedents that were available for inspection by Lester Smith during the one-year period after the search and seizure established that he had at least three years and eleven plus months (the length of time he actually waited) in which to file the §1983 claim of the First Count of his action. Thus if clear past precedent showed that he was entitled to defer the filing of his complaint for up to six years by reason of O.R.C. §2305.07 (which establishes a six-year limitations period for actions upon a liability created by statute and actions upon a contract not in writing), or up to four years by reason of O.R.C. §2305.09 (which governs certain non-contractual actions), it would be inequitable for the courts to tell Lester Smith, after the fact, that an action commenced within three years and eleven plus months was not timely filed.

The multifaceted conspiracies against plaintiffs were in place and working during July, August, September, October and November of 1981. The scheme of defendants against plaintiffs' rights did not become known to plaintiff until the "search and seizure" on 12-8-81. The immediately attendant "extensive media reporting and coverage as to the allegations of defendant

C-E Cast Equipment against plaintiffs Lester W. Smith and personnel of Western Reserve Group, Inc." (quote from Compl. ¶33, App. 18) began on 12-8-81. Therefore, following the precedent from *Vodila*, the clear past precedent period which should now be considered and reviewed is the one-year period between December, 1981 to December, 1982.

For the present purpose of seeking a rehearing on the automatic retroactive application of *Mulligan v. Hazard*, movant counsel now submit for consideration, the "Discussion of clear past precedents prior to December 8, 1982," quoted verbatim from the letter of July 1, 1988, pages 6 and 7.

Discussion of clear past precedents prior to December 8, 1982

98 A.L.R.2d 1160, (1964) was a reference authority for the Question: What Statute of Limitations is applicable to a damage action under Federal Civil Rights Act. This text, at 1164 refers to *Crawford v. Zeitler* (6th Cir. 1964), which would apply O.R.C. §2305.09 if cause of action is *not* for malicious prosecution and false imprisonment, but *is* for tortious conduct and acts in concert or conspiracy.

Cohen v. Norris (9th Cir. 1962), is a cause supporting pleading a §1983 cause of action with a specific allegation as to unreasonable searches and seizures. (Search and seizure is arbitrary and unreasonable if not authorized by law). 300 F.2d 24

Garner v. Stephens (6th Cir. 1972) held that a school teacher fired for pregnancy who brought action under §1983 where no physical injury is involved or claimed is entitled to a five year statute of limitations and is *not* barred by a Kentucky one year statute against actions brought for an injury to the person of the plaintiff. 460 F.2d 1144

Gordon v. City of Warren (ED Mich. 1976). Judge Phillip Pratt observed that reported decisions "reflect indecision over the proper approach" for application of the statute of limitations with unique facts of the controlling rule—"to adopt the most analogous state statute of limitations" (415 F.Supp. at 558). 415 F.Supp 556

Hines v. Bd. of Educ. (6th Cir. 1982), was a *per curiam* decision in a school teacher wrongful dismissal case (plaintiff had unsuccessfully litigated a state law claim that she had been illegally dismissed). This Court footnote cited *Robertson v. Wegmann*, (argued blue cover brief '3378 Appeal, pp. 25, 26, 49) but applied the Kentucky one year limitation for an action for slander. 667 F.2d 564

Madison v. Wood (6th Cir. 1969), says that an officer alleging wrongful demotion more than three years before complaint filed is time barred. But, see footnote 3, the nature of the injury determines the appropriate remedy, and citation of the 9th circuit decision on *Cohen v. Norris.* 410 F.2d 564

Mason v. Owens Illinois, Inc. (6th Cir. 1975), gave plaintiff in an employment discrimination case the right to proceed in district court with the six year limitation from O.R.C. §2305.07. This precedent was available to plaintiffs here even though they would designate the same four year period of limitation for both the civil liberties and the antitrust counts. 517 F.2d 520

Minchella v. Estate of Stillman (6th Cir. 1966), is authority for a time bar against an allegation of joint conspiracy to imprison illegally when the complaint was filed more than two years after release from prison. But, Lester Smith could not on the facts make a claim under an imprisonment theory (he did file *before* his "probation period" ended). 356 F.2d 52

The final update citation presented in this letter will be *Schorle v. The City of Greenhills,* (S.D. Ohio 1981). The *Thomas* court summarized *Schorle* (829 F.2d at 574) by observing that Judge Spiegel concluded Schorle's Section 1983 claim was broader than a common law tort and therefore opted for the four-year residual statute of limitations contained in O.R.C. 2305.09. While *Schorle* was not the final word on the subject in 1983 (when the cause of action arose for Thomas), it was the final word on the subject in December 1981 (when the cause of action arose for Smith and WRG). 524 F.Supp 821

If the Panel will fairly reconsider on the basis of the above showing of clear past precedent, the affirmation of dismissal of the First Count should be reversed. Otherwise, the interests of fair administration of federal court justice require that Question 2 be answered and fully reconsidered by this Court; again to preserve the full scope of the issue involving the statute of limitations time bar defense.

Discussion as to Questions 3 and 4 and Dismissal of the Second and Third Counts as Affirmed

On the First Monday of October in 1987, the Supreme Court granted certiorari in two cases which had reached the high court from the Ninth and the Second Circuits. In both cases, there had been jury trial and circuit review on a complete record. The review granted 10-5-87 was for two cases dealing with the extent to which judicially created immunity should, or should not, be applied in favor of defendants for anticompetitive conduct.

In *Patrick v. Burget,* a jury award and district court trebling of $650,000 damages on Sherman Act claims was reinstated over a reversal by the Ninth Circuit (800 F.2d 1498).

The unanimous Supreme Court presented the question as whether the state-action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), protects physicians in the State of Oregon from federal antitrust liability for their activities on hospital peer-review committees. The Ninth Circuit said it did, the United States Supreme Court said it did not.

The Supreme Court reaffirmed a rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy." Second, the anticompetitive conduct must be "actively supervised" by the State itself.

The Supreme Court concluded that the case at bar did not require it to decide the broad question whether judicial review of private conduct ever can constitute active supervision.

On reconsideration, the Panel may rationalize that the role played by the State Court judge, from the plea of not guilty *2-22-82* to the bargained plea of guilty *1-13-84* was "active supervision." However, such rationale would be capricious."* As best said for defendants' antitrust immunity defense, the proceedings supervised by the Ohio court were prosecutorial, without trial and summary in disposition of pretrial motions for the defendants there—plaintiffs here—who never confessed but were coerced.

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* Such an argument also disregards the State Court Judge's order '. . ., that the proceedings in this case shall be deemed not to have occurred . . ." See, plaintiffs' Exh. 300, App. 455. (A60, *supra.*)

The tandem case for review of judicially created immunity for anticompetitive conduct resulted in affirmance of *Indian Head, Inc. v. Allied Tube & Conduit Corp.* (817 F.2d 938), cited in the blue cover brief for Appeal '3657. Plaintiffs offered a summation of the federal law on the *Noerr-Pennington* doctrine by direct quotation of the Second Circuit (from 817 F.2d at 942) on brief pages 7-9.

In *Allied Tube & Conduit v. Indian Head, Inc.* the petitioner contended that its efforts to affect the product standard-setting process of a private association were immune from antitrust liability under the *Noerr-Pennington* doctrine primarily because the association's standards were widely adopted into law by state and local government. The Second Circuit said it did not. The United States Supreme Court also said it did not.

Justice Brennan writing for a 7-2 majority in *Allied Tube* begins with a review of facts proven by the jury trial. The jury instructions, answers to special interrogatories and the jury's special findings were each considered.

Part II of the Opinion begins with a mandate—the scope of this [*Noerr-Pennington*] protection depends, however, on the source, context, and the nature of the anticompetitive restraint at issue.

The Panel decision has focused exclusively on a single act by the plaintiff person Fact 2, the coerced plea bargain agreement of 1-13-84. The Panel has expressed no interest in nor reached any conclusion as to the source, context, and nature of the anticompetitive restraints by defendants at issue—the conspiracies and actions beginning mid-year 1981 creating and maintaining monopoly power to at least March 13, 1987.

When the state grand jury indicted, there were mere allegations of several crimes which can be shown at a plenary trial on the merits as having been capable of no reasonable proof. At trial, a false assertion by the Combustion Engineering defendants of trade secrets will be shown as yet another form of antitrust violation. See, *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842 (1st Cir. 1985), *cert. denied*, 474 U.S. 1016 (1986). (Assertion of trade secret claim in bad faith is a predatory practice under antitrust laws.)

The proper answer to Question 3, "Yes", would point this Circuit and the right rule or logic for judicially created immunity for anticompetitive conduct toward the Second Circuit in *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938 (1987) and the Seventh Circuit in *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (1982).

The Panel should not have overlooked the well-reasoned dissent in *Westmac, Inc. v. Smith*, 797 F.2d 313 (6th Cir. 1986) as applying to the facts of this case, to wit: defendants' business competitor was

> "driven out of the market by factors related to the litigation process itself-cost, delay, damage to reputation, decreased sales, etc.—long before any judgment in the action is rendered." *Id.* at 322.

Long before the guilty pleas were entered plaintiff Smith suffered loss of employment and income, paid expensive attorney's fees, was the subject of public disgrace and humiliation, and was burdened by the psychological trauma of over two years of uncertainties: A Kafkaesque experience, with only dark at the end of the tunnel [Exh. 2 (App. 122, 123) and Compl. ¶78]. Plaintiff WRG was forced to cease all business activities [Compl. ¶58]. The cost and delay of the state litigation, the damage to

plaintiffs' reputation and the termination of sales by WRG in competition with Combustion Engineering were the results of the *institution* of the litigation, not the results of the litigation itself.

The dissent in *Westmac, Inc. v. Smith,* seeks a definition of the *Noerr-Pennington* doctrine's sham exception "... that is clear and analytically sound as well as functional." The dissent recognizes the clear distinction between "abuse of process" and "malicious prosecution." The dissent would hold that any rule or logic for decision that the existence of an "issue of substance" or "colorable claim" should be held to create a constitutional presumption—rebuttable or irrebuttable—of no judicial abuse of process, and hence no sham, is wrong.

The proper answer to Question 4, "Yes", is clear, particularly with benefit of *Duncan v. Peck,* 844 F.2d 1261. Defendants seeking immunity by a Rule 56 summary judgment for anticompetitive conduct alleged to be conspiratorial and predatory must have some or a minimal evidentiary burden. The Panel has said that the district court correctly found "As to plaintiffs claims of conspiracy between the defendants and unnamed co-conspirators, the plaintiff has alleged no set of facts that would remove the defendants conduct from the shield of the *Noerr-Pennington* doctrine." It is clear from the Panel decision, that the key and only fact which plaintiff could not allege—the State Court criminal proceeding did terminate in plaintiff's favor—is considered controlling. To require defendants to assert that the State court proceeding was in "good faith" is logical and consistent with even handed rendering of justice by courts of this Circuit. Ends must not always justify means.

Statement and Conclusion

The result reached by the Panel decision sends a message to any company doing business in the four states of this Circuit. A company which wants "to possess or attempt to possess monopoly power", in a relevant market or actual market; a company which would "maintain that monopoly power by willful acquisition as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident [Compl. ¶50]; a company which has no issued patents or registered trademarks or copyrights or bona fide trade secrets—can still destroy a fledgling or up-and-coming business competitor without risk of antitrust or Sherman Act sanction.

Following the pattern of the Combustion Engineering defendants in this case who discovered that previous customers were buying from an unknown competitor: A company facing competition can hire a zealous private investigator who will even look at garbage set out for trash collection; identify and suborn at least one supplier to the competitor [in this case, defendant Lawrence K. Hubbell]; retain prominent local counsel and take sworn statements [shielded in this case, from pretrial discovery by claiming privilege]; talk to a county prosecutor; obtain a search warrant from a distinterested magistrate (here, a judge in another county); make a search and seizure at the competitor's place of business using a company employee [defendant Fisher] and the private investigator; use the sensationalism of TV and the print media during and after the search; get an indictment for several offenses through an available prosecutor; have the friendly prosecutor protract the prosecution for months or years before agreeing to accept a guilty plea to a minor

offense; ask for money restitution to impoverish the competitor; and, finally swap the money from restitution for a covenant not to compete for an additional three-year period.

The Combustion Engineering defendants did all of these things and have now been shielded by two courts in Sixth Circuit.

Respectfully submitted,

EDNA REBECCA HAZELETT-COOK
MACK D. COOK, II

PROOF OF SERVICE

One copy of the foregoing PETITION FOR REHEARING with SUGGESTION FOR REHEARING EN BANC will have been mailed not later than September 7, 1988, by first class U. S. mail, postage prepaid, to Walter A. Bates, Esq., 1100 Huntington Building, Cleveland, Ohio 44115, Attorney for the ten related defendants other than Lawrence K. Hubbell, and to William A. Hamann, Jr., Esq., 24549 Detroit Road, Westlake, Ohio 44145, and to James J. Dyson, Esq., Brainard Place, 29001 Cedar Road, Cleveland, Ohio 44124, both attorneys for Lawrence K. Hubbell.

/s/ EDNA REBECCA HAZELETT-COOK
Attorney for Appellants

(The undersigned attorney has no firm name or address for David G. Utley, identified as receiving a copy of the order and decision filed August 24, 1988.)

/s/ EDNA REBECCA HAZELETT-COOK

PETITIONERS' STATEMENT OF ISSUES PRESENTED FOR REVIEW, COURT OF APPEALS FOR THE SIXTH CIRCUIT, APPEAL NO. 87-3761

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER FULL FAITH AND CREDIT AND A STATE COURT JUDGMENT OF EXPUNGEMENT OF CONVICTION HAVE AN EFFECT ON EARLIER JUDGMENTS OF THE DISTRICT COURT IN THIS CASE.

II. WHETHER DENIAL OF A TIMELY FILED RULE 60(b) MOTION BASED ON A STATE COURT JUDGMENT OF EXPUNGEMENT FOR RECONSIDERATION OF A DISTRICT COURT JUDGMENT GOES AGAINST THE UNITED STATES CONSTITUTION, ARTICLE 4, SECTION 1, FEDERAL STATUTES, THE OHIO EXPUNGEMENT STATUTE, THE OHIO CASE LAW ON ORDERS OF EXPUNGEMENT, OR THE RULES OF EVIDENCE AND IS THEREFORE WRONG AND AN ABUSE OF DISCRETION BY THE DISTRICT COURT.

LETTER FOR PETITIONERS, DATED JULY 1, 1988, LIST OF CITATIONS UPDATING THE BRIEFS OF APPELLANTS FOR APPEALS NOS. 87-3378 and 87-3657

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July 1, 1988

Office of the Clerk
United States Court of Appeals
For the Sixth Circuit
U. S. Post Office & Courthouse Bldg.
Cincinnati, OH 45202

Re: In The Matter of Consolidated
Appeals No. 87-3378 and No. 87-3657
and
List of Citations Updating the Briefs of Appellants

Gentlemen:

This letter is submitted by plaintiffs-appellants as original and three (3) copies. By stipulation with Walter Bates, Esq. (made 6-2-88), one service copy each of this letter will have been mailed as of July 1, 1988, to all counsel of record for all defendants-appellees (Messrs. Bates and Hamann and Dyson).

The Complaint was drafted in 1985, once amended after discovery and a deposition, to present eighty (80) paragraph allegations and three counts with multiple claims and prayers for cumulative and separate money damages.

Briefing of these appeals took place in the months June to September 1987.

From January 1988 to date, counsel for plaintiffs have made a reasoned and studied professional judgment that selected additional authorities having informational and precedential value need to be directed to the attention of this Court, before rather than at or after hearing and decision.

The update citations are first listed alphabetically; the recent decisions from the Supreme Court are summarized for relevance; and, most of the citations are precisely applied by argument to the old issues and questions presented in the briefs.

[2] *Update citations listed alphabetically*

Allied Tube & Conduit Corp. v. Indian Head Inc., (No. 87-157), _____ U.S. _____ (1988) (decided 6-13-1988, 56 U.S.L.W. 4539).... 15,17

American Law Reports Annotated, Second Series (1964) 98 A.L.R.2d 1160..... 6

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., No. 87-367, (oral argument 3-23-88, 56 U.S.L.W. 3682)..... 10,11

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 820 F.2d 186 (6th Cir. 1987)..... 9,10

Black Law Enf. Officers Ass'n. v. City of Akron, 824 F.2d 475 (6th Cir. 1987), (Please insert citation on page -ii- and page 21 of gray cover brief for Appeal '3378)

Burlington Northern (In re), 822 F.2d 518 (5th Cir. 1987), (cert. denied as *Union Pacific Railroad Co. v. Energy Transportation System, Inc.*, No. 87-705, _____ U.S. _____ (56 U.S.L.W. 3447)... 16

CVD, Inc. v. Raytheon Co., 769 F.2d 842 (1st Cir. 1985) (Assertion of trade secret claim in bad faith is a predatory practice under antitrust laws.)..... 4

Chevron v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)

Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, 690 F.2d 1240 (9th Cir. 1982) (Please insert page citation 1259 on page 14 of blue cover brief for Appeal '3378)

Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962)..... 6

Constantine v. City of Akron, _____ F.Supp. _____ (N.D. Ohio, E.D., 1988) (No. 86-1269A, decided October 30, 1987) (Judge Krenzler used collateral estoppel to bar §1983 claim *when* plaintiffs are given a full and fair opportunity to litigate legality of the search and seizure at the criminal proceedings in state court.)

Crawford v. Zeitler, 326 F.2d 119 (6th Cir. 1964) 6

Duncan v. Peck, 844 F.2d 1261 (6th Cir. 1988)..... 13

Gaff v. Federal Deposit Ins. Corp., 828 F.2d 1145 (6th Cir. 1987) (rehearing of same case, 814 F.2d 311) 7,8,9

Garner v. Stephens, 460 F.2d 1144 (6th Cir. 1972)... 6

[3] *Goodman v. Lukens Steel Co.*, _____ U.S. _____, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987).. 4,11,12

Gordon v. City of Warren, 415 F.Supp. 556 (ED Mich., 1976) rev'd. on other grounds, *Gordon v. Warren*, 579 F.2d 386 (6th Cir. 1978)..... 6

Hines v. Bd. of Educ., 667 F.2d 564 (6th Cir. 1982)..... 6

Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938 (2nd Cir. 1987)..... 15

Kentucky v. Long, 837 F.2d 727 (6th Cir. 1988) (Demonstrates in depth analysis of pattern of conduct and legal logic as to an immunity from litigation established by the Supremacy Clause of the Constitution of the United States)

Madison v. Wood, 410 F.2d 564 (6th Cir. 1969) 7

Mason v. Owens Illinois, Inc., 517 F.2d 520 (6th Cir. 1975)..... 7

Minchella v. Estate of Stillman, 356 F.2d 52 (6th Cir. 1966) 7

Okure v. Owens, 816 F.2d 45 (2nd Cir. 1987) 11

Owens v. Okure, No. 87-56, (cert. granted 3-22-88, 56 U.S.L.W. 3647, for *Okure v. Owens*) 10,11,12

Patrick v. Burget, (No. 86-1145,) _____ U.S. _____ (1988) decided 5-16-1988, 56 U.S.L.W. 4430) 14,17

St. Francis College v. Al-Khazraji, _____ U.S. _____, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987) .. 4,11

Schorle v. The City of Greenhills, 524 F.Supp. 821 (S.D. Ohio 1981) 7

Sessions Tank Liners v. Joor Mfg. Inc., 827 F.2d 458 (9th Cir. 1987) 17

Thomas v. Shipka (II), 829 F.2d 570 (6th Cir. 1987).. 4,5

Vodila v. Clelland, _____ U.S. _____, 107 S.Ct. 3255, 97 L.Ed.2d 754 (1987) 4,11

Vodila v. Clelland (II), 836 F.2d 231 (6th Cir. 1987).. 4

[4] *Recent decisions from the Supreme Court relating to the First Count*

In Appeal '3378 this Court is asked to reverse decisions by the district court which summarily dismissed the First Count of the Complaint, filed 11-18-85 amended with leave 1-23-86, on the basis of retroactive application of *Mulligan v. Hazzard* and an Ohio law one-year limitation period.

There have been three Supreme Court decisions since the briefing schedule was complete:

St. Francis College v. Al-Khazraji, (an affirmance of *Al-Khazraji v. St. Francis College,* 784 F.2d 505, cited in blue cover brief for Appeal '3378, p. 41.);

Goodman v. Lukens Steel Co.; and,

Vodila v. Clelland.

Each case has applied a rule of law from the 1971 Supreme Court decision *Chevron v. Huson,* (sets forth a three-part test to be used for retroactive application of decisions adopting a new statute of limitations).

The four Supreme Court decisions were applied by a panel of this Court (Judges Engel, Krupansky and Guy) in *Thomas v. Shipka (II),* decided 11-18-87; on petition for rehearing of *Thomas v. Shipka (I),* 818 F.2d 496 (cited blue cover brief for Appeal '3378, p. 39). Ms. Thomas was discharged from her job with the Parma Municipal Courts on 4-7-83: nearly two years later, on 4-5-85, plaintiff filed suit in district court.

On remand from the Supreme Court, another panel of this court (Judges Keith, Nelson and Boggs) in *Vodila v. Clelland (II),* decided 12-28-87, reconsidered the case of John D. Vodila employed as a dentist in a mental

hospital operated by the State of Ohio. On 7-20-80 Dr. Vodila was discharged for alleged neglect of duty and incompetence. The action was filed in district court 4-6-83.

During past weeks, counsel for plaintiffs have studied *Thomas v. Shipka (II)* and *Vodila v. Clelland (II)* to determine how this Court will [5] determine the retroactive application of an Ohio statute of limitations adopted under *Wilson v. Garcia.*

Quoting from *Thomas v. Shipka (II),* (829 F.2d at 572, footnote omitted), the *Vodila* court observed that the Supreme Court's action "compels the conclusion that the one-year statute of limitations adopted in *Mulligan* for all Section 1983 claims brought in Ohio is *not* to be applied retroactively and that the decision as to retroactivity must be made on a case-by-case basis."

The rationale of *Vodila* may be, in fair paraphrase, presented in argument as follows:

> —The most significant question presented in this case, as *Thomas* teaches, is whether the precedents that were available for inspection by Lester Smith during the one-year period after the search and seizure established that he had at least three years and eleven plus months (the length of time he actually waited) in which to file the §1983 claim of the First Count of his action. Thus if clear past precedent showed that he was entitled to defer the filing of his complaint for up to six years by reason of O.R.C. §2305.07 (which establishes six-year limitations period for action upon a liability created by statute and actions upon a contract not in writing), or up to four years by reason of O.R.C. §2305.09 (which governs certain non-contractual actions), it would be inequitable for the courts to tell Lester Smith, after the fact, that an action commenced within three years and eleven plus months was not timely filed.—

Following their understanding of *Vodila*, plaintiffs' counsel considered work product papers prepared during October-November 1985 and the authorities cited in the district court and argued again to this Court. See, blue cover brief for Appeal '3378, Issue IV, pp. 23-45, and red cover brief for Appeal '3378, Issue IV, pp. 21, 22.

The multifaceted conspiracies against plaintiffs were in place and working during July, August, September, October and November of 1981. The scheme by defendants against plaintiffs' rights did not become known to [6] plaintiff until the "search and seizure" on 12-8-81. The "clear past precedent" period of *Vodila* is the one-year period between December 1981 to December 1982.

The following citations are available for this Court to now determine it would be inequitable for the courts to tell Lester Smith, after the fact, that an action commenced within four years was not timely filed. [The Complaint, ¶2, alleges "This action is timely filed by virtue of Title 15 U.S.C. §15b and Ohio Revised Code §2305.09 (four-year statute of limitation)."]

Discussion of clear past precedents prior to December 8, 1982

98 A.L.R.2d 1160, (1964) was a reference authority for the Question: What Statute of Limitations is applicable to a damage action under Federal Civil Rights Act. This text, at 1164, refers to *Crawford v. Zeitler* (6th Cir. 1964), which would apply O.R.C. §2305.09 if cause of action is *not* for malicious prosecution and false imprisonment, but *is* for tortious conduct and acts in concert or conspiracy.

Cohen v. Norris (9th Cir. 1962), is a case supporting pleading a §1983 cause of action with a specific allegation as to unreasonable searches and seizures. (Search and Seizure is arbitrary and unreasonable if not authorized by law).

Garner v. Stephens (6th Cir. 1972) held that a school teacher fired for pregnancy who brought action under §1983 where no physical injury is involved or claimed is entitled to a five year statute of imitations and is *not* barred by a Kentucky one year statute against actions brought for an injury to the person of the plaintiff.

Gordon v. City of Warren (ED Mich. 1976). Judge Phillip Pratt observed that reported decisions "reflect indecision over the proper approach" for application of the statute of limitations with unique facts of the controlling rule—"to adopt the most analogous state statutes of limitations" (415 F.Supp at 558).

Hines v. Bd. of Educ. (6th Cir. 1982), was a *per curiam* decision in a school teacher wrongful dismissal case (plaintiff had unsuccessfully litigated a state law claim that she had been illegally dismissed). This Court footnote cited *Robertson v. Wegmann*, (argued blue cover brief '3378 Appeal, pp. 25, 26, 49) but applied the Kentucky one year limitation for an action for slander.

[7] *Madison v. Wood* (6th Cir. 1969), says that an officer alleging wrongful demotion more than three years before complaint filed is time barred. But, see footnote 3, the nature of the injury determines the appropriate remedy, and citation of the 9th circuit decision on *Cohen v. Norris.*

Mason v. Owen Illinois, Inc. (6th Cir. 1975), gave plaintiff in an employment discrimination case the right to proceed in district court with the six year limitation from O.R.C. §2305.07. This precedent was available to

plaintiffs here even though they would designate the same four year period of limitation for both the civil liberties and the antitrust counts.

Minchella v. Estate of Stillman (6th Cir. 1966), is authority for a time bar against an allegation of joint conspiracy to imprison illegally when the complaint was filed more than two years after release from prison. But, Lester Smith could not on the facts make a claim under an imprisonment theory (he did file *before* his "probation period" ended).

The final update citation presented in this letter will be *Schorle v. The City of Greenhills,* (S.D. Ohio 1981). The *Thomas* court summarized *Schorle* (829 F.2d at 574) by observing that Judge Spiegel concluded Schorle's Section 1983 claim was broader than a common law tort and therefore opted for the four-year residual statute of limitations contained in O.R.C. 2305.09. While *Schorle* was not the final word on the subject in 1983 (when the cause of action arose for Thomas), it was the final word on the subject in December 1981 (when the cause of action arose for Smith and WRG).

A further update citation from Sixth Circuit relevant to the First Count

Gaff v. Federal Deposit Ins. Corp. (6th Cir. 1987), became relevant to this case on rehearing of the same case. In *Gaff*, plaintiff asserted three sets of claims in one count in his individual capacity as a shareholder: (1) federal claims arising under the federal banking laws; (2) federal claims arising under the federal securities laws; and, (3) pendent state law claims. In both appeals, this Court upheld dismissal of the two federal claims because plaintiff lacked standing to maintain direct causes of action under provisions of federal law. However, on

rehearing this Court concluded that the district court properly retained jurisdiction of the state law claim but made no specific finding as to that claim before dismissal. The Court (Judges Engel, Boggs and Contie) said—"Only after the district court has fully addressed [8] Gaff's allegations and made specific findings with respect to them will we be able to engage in proper review and determine whether Gaff has stated a viable direct cause of action under state law" (828 F.2d at 1151).

In this case, the district court treated the First Count as though making only a Section 1983 claim. In the First Count (designated by the district court as "Count I") plaintiffs have asserted a common nucleus of operative facts: A trespass upon real property; a taking and detaining [conversion] of personal property; and, an injury to civil rights.

These wrongs give rise to three sets of claims based on violations of guaranteed liberties: (1) a pendent state law claim [¶34]; (2) a federal claim arising under Section 1983 [¶35]; and, (3) another federal claim arising under 42 U.S.C. §1988 and the Constitution of the State of Ohio [¶44].

In the Complaint, paragraph 1, subject matter jurisdiction for the state law claim is created by the pleading of 42 U.S.C. §1332 (Diversity of Citizenship—defendants Combustion Engineering, Calvert, Kelly and Santry are in Connecticut). Jurisdiction for the federal law claim under Section 1983 is conventionally created by the pleading of 42 U.S.C. §1343. For the third claim under 42 U.S.C. §1988, jurisdiction is created by the pleading of 28 U.S.C. §1331 (Federal Question).

The district court has on three occasions addressed the First Count (2-19-86, 7-29-86 and 3-24-87, Con. Jt. App. 79, 93 and 96). On each occasion, the district court has written too narrow, has commingled, the state law and the Section 1988 claims with the separate claim for a Section 1983 violation. Under the recent authority of *Gaff,* we are permitted to point out the three types of claims combined in the First Count. It further follows from *Gaff,* that the total dismissal of the First Count must be reversed and remanded, at least to the extent that the district court can make specific findings about a time bar defense as to the state law and Section 1988 claims in the First Count.

As comment only, without criticism, we refer to the Order of this Court (Judges Keith, Norris and Edwards) filed April 11, 1988, dismissing Appeal No. 87-3761 for lack of appellate jurisdiction. The second paragraph [9] on page 1 refers to plaintiffs' ". . . alleged claims against each of eleven named defendants and three unnamed defendants under *42 U.S.C. §1983* and 15 U.S.C. §§1, 2" [emphasis supplied]. To preserve the question presented on blanket dismissal of *all claims* in the First Count, by retroactive application of *Mulligan v. Hazard,* and proceeding on the authority of *Gaff,* this question is respectfully brought to the attention of this Court prior to oral argument.

Another pending decision from the Supreme Court about Sixth Circuit views on applying an Ohio Statute of Limitations

Bendix Autolite Corp. v. Midwesco Enterprises, Inc. was decided June 3, 1987, by Judges Martin, Jones and Milburn. The decision was that Ohio's tolling statute, O.R.C. 2305.15, places an impermissible burden on

interstate commerce and *per se* violates the Commerce Clause. Plaintiffs were under a "disability" precluding commencement of this case in the federal court system until after "sentence" by the State Court on January 13, 1984. (Perhaps, the disability to proceed with federal court litigation against the defendants continued until the "probation period" was ended by State Court Order on 1-12-85.) However, the *Bendix Autolite* decision precluded raising as an appeal issue a claim for benefit of §2305.15.

The amended Complaint paragraphs 78, 79 and 80 (App. 33, 34) make factual allegations as to the condition of plaintiff Lester W. Smith before, on and after January 13, 1984. The district court Order of 3-24-87, second page (App. 76), includes a paragraph:

> In requesting reconsideration, plaintiffs argue that their guilty pleas were coerced by such factors as the length of the prosecution, financial hardship, and humiliation and embarrassment. As the Court interprets it, plaintiffs' position seems to be that the Court should not have treated the guilty pleas as valid since they were allegedly coerced in one way or another.

The concept of "tolling" a statute of limitations by the facts of a plaintiff's case has origin in the common law. However, as a matter of [10] professional judgment based upon the specific wording of the Ohio tolling statutes (O.R.C. 2305.15 *and* 2305.16) and the then just available decision in *Bendix Autolite,* the equitable question of when "a cause of action accrues against . . ." the defendants in this case was not raised when the briefs were written in 1987.

Now, the acceptance for review by the Supreme Court of the constitutionally based decision of *Bendix*

Autolite (as No. 87-367) revives the issue which was before the district court as an appeal question before this Court.

The decision by the Supreme Court is forthcoming. Argument was heard 3-23-88 (56 U.S.L.W. 3682). To preserve the question presented on the dismissal of the First Count, by application of *Mulligan v. Hazard* without benefit of equitable "tolling", this question is respectfully brought to the attention of this Court prior to oral argument.

A pending decision from the Supreme Court about the Second Circuit view on statutes of limitation against a plaintiff's case since Wilson v. Garcia

Owens v. Okure, No. 87-56, cert. granted 3-22-88, will provide opportunity for the Supreme Court to evaluate the impact of *Wilson v. Garcia* on civil liberties cases filed in the federal court system by constitutionally wronged plaintiffs.

The plaintiff Tom U. U. Okure complained in district court that defendant state university police officers battered and beat him on the university campus. The arrest and alleged beating took place on 1-27-84. The Section 1983 action was filed twenty-two months later. The defendants moved to dismiss on a one-year time bar. The motion was denied (625 F.Supp. 1568). The district court permitted the interlocutory appeal and the order denying the motion to dismiss was affirmed 2-1.

For plaintiffs' case on this appeal, the words of the majority opinion should be persuasive—

> Even though civil rights violations are typically, and perhaps necessarily, intentional, that characterization is not [11] controlling. We believe

> that the *Wilson* Court's choice of the term "general" to describe personal injury torts analogous to section 1983 claims was neither casual nor superfluous. Rather, we read therein a command that our choice of statute of limitations from New York law be expansive enough to accommodate the diverse personal injury torts that section 1983 has come to embrace so as not to exclude claims that stray from a precisely drawn analogy. (816 F.2d at 48).

However, it is our professional duty to point out that Judge Van Graafeiland, in dissent, cast his lot "with those Courts of Appeals which hold that state limitation periods governing essentially all intentional personal injuries are better analogized to section 1983 claims that [sic] limitation periods confined almost entirely to unintentional torts." And, the first example is *Mulligan v. Hazard* (see, 816 F.2d at 51).

The issue of a statute of limitations or time bar was presented to the district court three times and was pending for fifteen months. The written arguments in the blue and grey cover briefs for Appeal '3378, as to Issue IV, remain meritorious.

Since *Wilson v. Garcia* (4-17-85), the Supreme Court has looked at the justice of using a statute of limitations as a time bar defense for an otherwise likely to be liable defendant in: *Saint Francis College* (5-18-87); *Goodman v. Lukens Steel* (6-19-87); and *Vodila v. Clelland* (6-26-87) [107 S.Ct. 2022; 2636; and, 3255].

During this Term, the Supreme Court has heard *Bendix Autolite* and granted certiorari in *Owens v. Okure.*

Whether the Supreme Court will come down for the expansive interpretation of *Owens v. Okure* or favor the restrictive application of *Mulligan v. Hazard* is yet to be

heard. (One solution, argued in the briefs for plaintiffs here, is to agree that any civil rights violation causes a personal injury, and such violations may cause something other than injury to the person. This would do away with the intentional/nonintentional question last raised by *Owens v. Okure.*)

[12] When *Owens v. Okure* is decided, the dissent of Justice O'Connor in *Wilson v. Garcia* (105 S.Ct. beginning at 1949) may become the majority reasoning. That dissent was followed by criticism of *Wilson* by Justice White in *Jones v. Preuit & Maudlin* (106 S.Ct. 893), and the dissent of Justices White and Marshall in *Mulligan v. Hazard* (106 S.Ct. 2902), and the implied criticism by Justice O'Connor in *Goodman v. Lukens Steel* (107 S.Ct. at 2636).

This Court has adequate and equitable reasons to return plaintiffs' First Count for adjudication of its merits. However, this case also would enable this Court to revisit with *Mulligan v. Hazard* to consider "the diverse personal injury torts that section 1983 has come to embrace so as not to exclude claims that stray from a precisely drawn analogy." (816 F.2d at 48).

As stated in appellants' blue cover brief for Appeal '3378, ". . . counsel for plaintiffs will agree with what was said by the *Mulligan* court as to a very short statute of limitations for a 'teacher tenure' case" (see, page 41).

[13] *The use of affidavits to support a summary judgment claim for immunity*

Duncan v. Peck, decided 4-25-88 at 844 F.2d 1261, had previously been before this court as reported at 752 F.2d 1135 (1985). Both times, this court was considering a summary dismissal of plaintiff's case on the basis of an immunity defense. The recent decision seems to require

that a defendant moving for summary judgment on the basis of a good faith immunity defense must introduce "affidavits in the District Court from him and his attorney stating that he acted solely on the advice of his attorney" (844 F.2d 1267, 1268). Applying this logical rule to the record on these appeals, there are no affidavits from any of the defendants or attorneys from Arter & Hadden that any or all of them were acting "in good faith" when seeking out the participation of the county prosecutor for the actions leading to destruction of plaintiff and his company as business competitors.

The purpose of the evidentiary rule of *Duncan v. Peck* (II) may become significant for this Court to determine applicability of the "sham exception" against grant of Noerr-Pennington for immunity (if such a defense remains after *Patrick v. Burget* and *Allied Tube*).

Prosser on Torts

This citation is made to enhance the arguments made in the blue cover brief for Appeal '3378 regarding the district courts' misinterpretation of the tort abuse of process.

> Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance. Consequently in an action for abuse of process it is unnecessary for the plaintiff to prove that the proceeding has terminated in his favor, or that the process was obtained without probable cause or in the course of a proceeding begun without probable cause.
>
> . . . ¶

> The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding.

[14] *Two Supreme Court decisions relating to the Second and Third Counts*

Patrick v. Burget is the first of two new cases dealing with a judicially created immunity for anticompetitive conduct. A jury award and district court trebling of $650,000 damages on Sherman Act claims, was reinstated over a reversal by the Ninth Circuit.

The unanimous Supreme Court presented the question as whether the state-action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), protects physicians in the State of Oregon from federal antitrust liability for their activities on hospital peer-review committees. The Ninth Circuit said it did, the United States Supreme Court said it did not.

The Supreme Court reaffirmed "[A] rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws .... First, 'the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy" ' .... Second, the anticompetitive conduct 'must be "actively supervised" by the State itself.' " (56 U.S.L.W. at 4431).

The Supreme Court concluded that the case at bar "does not require us to decide the broad question whether judicial review of private conduct ever can constitute active supervision, ..." (56 U.S.L.W. at 4432).

The defendants may argue that the role played by the State Court judge, from the plea of not guilty in 1982 to the bargained plea of guilty in 1984, was "active supervision." However, such argument would be capricious.* As best said for defendants, the proceedings supervised by the Ohio court were prosecutorial, without trial and summary in disposition of pretrial motions for the defendants there—plaintiffs here—who never confessed but were coerced.

[15] The second Supreme Court case, *Allied Tube,* resulted in affirmance of *Indian Head, Inc. v. Allied Tube & Conduit Corp.* (817 F.2d 938), cited in the blue cover brief for Appeal '3657. Plaintiffs offered a summation of the federal law on the *Noerr-Pennington* doctrine by direct quotation of the Second Circuit (from 817 F.2d at 942) on brief pages 7-9.

In Allied Tube & Conduit v. Indian Head, Inc. the petitioner contended that its efforts to affect the product standard-setting process of a private association are immune from antitrust liability under the *Noerr* doctrine primarily because the association's standards were widely adopted into law by state and local governments. The Second Circuit said it did not. The United States Supreme Court also said it did not.

Justice Brennan writing for a 7-2 majority in *Allied Tube* begins with review of facts proven by the jury trial. The jury instructions, answers to special interrogatories and the jury's special findings were each considered.

Part II of the Opinion begins with a mandate—The scope of this [*Noerr-Pennington*] protection depends, however, on the source, context, and nature of the

* Such an argument also disregards the State Court judge's order ". . ., that the proceedings in this case shall be deemed not to have occurred . . . ." See, plaintiffs' Exh. 300, App. 455.

anticompetitive restraint at issue (56 U.S.L.W. 4540). In these instant appeals, the district court has focused exclusively on a single act by the plaintiff person (the result of the coerced plea-bargain agreement, occurring on January 13, 1984) and has made no finding nor reached any conclusion as to the source, context, and nature of the anticompetitive restraints by defendants at issue—the conspiracies and actions from mid-year 1981 to at least March 13, 1987.

The irony present in these appeals is that the district court could have determined (under the *Vodila* authority) what *plaintiff* had the legal right to *think* for statute of limitation purposes—but it did not! The district court should not have accepted (under the *Allied Tube* authority) what the *plaintiff* did in relation to the antitrust counts—but it did!

[16] *A recent Supreme Court action bearing on Issue I in Appeal '3657*

The second appeal focuses on the antitrust immunity created for defendant Lawrence K. Hubbell *sua sponte* by the district court.

Plaintiffs Exhibit 48-4 (App. 145, 146) demonstrates the intent of Mr. Hubbell, as president of plaintiff's vendor Royalton Manufacturing Inc., to go along with Ed Niam of Niam Investigations and Ed Kavanagh of C-E Cast Equipment. There was no allegation in the complaint, nor has any evidence been discovered, that defendant Hubbell had any involvement with a county prosecutor.

In the blue cover (and only) brief for Appeal '3657, the decision *In re Burlington Northern, Inc.* (822 F.2d 518) is referenced on pages 10, 11, and 16. The Fifth

Circuit decision is analyzed, quoted and put forth in summation as to Issue I—

> The Fifth Circuit in *Burlington* illuminates the characterization of Hubbell as a "bystander" or "assister" to the other ten defendants—one who has no standing to claim Noerr-Pennington immunity. The legal questions touched by the Ninth and Fourth Circuits, in *Forro* and *Ottensmeyer,* require that this Court should have had the benefit of a district court trial on "why" defendant Hubbel did what he did and, if deemed necessary, "what" was done and "where" he did it before reviewing a dismissal of the merits of plaintiffs' case.

On January 11, 1988, the Supreme Court denied review.

Counsel for appellant in these appeals suggests that the Supreme Court appreciated the bottom line result in *Burlington Northern* and therefore denied review; well knowing that it had previously decided* to take up the policy considerations underlying antitrust immunity in the *Patrick v. Burget* and *Allied Tube* cases.

[17] *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*

This decision from Ninth Circuit (decided 9-2-87) is a Noerr-Pennington case involving lobbying a model fire code for underground gas storage tanks. The district court favored the defendant as immune from antitrust liability and granted summary judgement; the circuit court affirmed in part but reversed and remanded in part. Both sides have petitioned for certiorari (Sessions in No. 87-687 and Joor in No. 87-916). As a Ninth Circuit decision, without reference to pending certiorari, the case is cited in footnote 10 of the majority opinion in *Allied Tube & Conduit* (56 U.S.L.W. at 4543) and in the dissent.

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* Review for both granted 10-5-87, 56 U.S.L.W. 3242.

Having read both *Patrick v. Burget* and *Allied Tube,* counsel for appellants in these appeals are of the opinion that the Supreme Court, having known that plaintiff Sessions has been given a remand for trial, with opportunity for a full record, will deny certiorari in both No. 87-687 and No. 87-916; or grant certiorari in No. 87-687 and remand for trial in light of its decision in *Allied Tube.* Either way, the result of Supreme Court action will favor plaintiffs' appeal.

Respectfully submitted,

/s/ REBECCA H. COOK

RHC:pha
cc: Walter Bates, Esq.
James J. Dyson, Esq.
William A. Hamann, Jr.

PETITIONERS' LETTER DATED MARCH 1, 1987 TO DISTRICT COURT CITING WESTMAC, INC. V. SMITH, 797 F.2d 313 (6TH CIR. 1986) AND GRIP-PAC, INC. V. ILLINOIS TOOL WORKS, INC., 694 F.2d 466 (7TH CIR. 1982)

COOK & COOK
Attorneys At Law
900 First National Tower
Akron, Ohio, U.S.A. 44308

MACK D. COOK, II

Telephone 376-1005
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March 1, 1987

Hon. David D. Dowd, Jr.
United States District Court
Northern District of Ohio
Federal Building, U.S. Courthouse
2 South Main Street
Akron, Ohio 44308

Re: *Lester W. Smith, et al*
vs.
Combustion Engineering, Inc. et al
C85-3451A

Dear Judge Dowd:

This Court currently has pending a—

REQUEST FOR RECONSIDERATION OF THE MEMORANDUM OPINION AND JUDGMENT ENTRY (1-21-87) DISMISSING SECOND AND THIRD COUNTS (ANTITRUST)

filed 1-30-87 on behalf of the plaintiffs and signed by the undersigned attorney.

The purpose of this communication is to respectfully advise this Court of citations of law and authorities which we consider relevant to the *Noerr-Pennington* doctrine, as previously argued for the parties and as considered by this Court.

With all respect, we cite to this Court:

Westmac, Inc. v. Smith, 797 F.2d 313, at 320-323 (6th Cir. 1986) *cert. denied*, _____ U.S. _____, _____ S.Ct. _____, 98 L.Ed.2d 838 (1987);

Grip-Pac, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982) *cert. denied*, 461 U.S. 958, 103 S.Ct. 243, 77 L.Ed.2d 1317 (1983).

Westmac is cited for the logic and law of the *dissent* by Circuit Judge MERRITT.

Grip-Pac is cited for the logic and law of the unanimous opinion by Circuit Judge POSNER, for a panel including Senior Circuit Judge WEICK of the Sixth Circuit.

By way of explanation, not as an excuse for late citation of *Westmac* and *Grip-Pac*, the undersigned attorney has been assisting the lead attorney for the plaintiffs in the prosecution of the case at bar. (A disability of Mack D. Cook, II, is explained in a Motion For Enlargement of Time to Respond to Defendants' Motion for Summary Judgment, filed 7-11-86, Dkt. Nr. 76 and granted 7-14-86, Dkt. Nr. 77. The referenced physical disability has, unfortunately, been of a continuing nature; but Mack Cook has been available for consultation with the undersigned attorney.) This assistance has been available only on a limited (primarily, a Saturday and Sunday) basis and therefore the results of our legal research and the finding of *Westmac* and *Grip-Pac* was not completed until today.

The undersigned attorney respectfully argues that the logic and law of the dissent in *Westmac, Inc.*, being in the Sixth Circuit can well persuade this Court to further reconsider and amend the MEMORANDUM OPINION and JUDGMENT ENTRY filed January 21, 1987, and to deny to the ten defendants a summary judgment dismissing Counts II and III of the Complaint.

The undersigned attorney herewith certifies that a copy of this letter will have been mailed no later than Monday, March 2, 1987, to Walter A. Bates, Esq., 1100 Huntington Building, Cleveland, Ohio 44115, Attorney for the ten related Defendants other than Lawrence K. Hubbell, and to William A. Hamann, Jr., Esq., 24549 Detroit Road, Westlake, Ohio 44145 and to James J. Dyson, Esq., Brainard Place, 29001 Cedar Road, Cleveland, Ohio 44124, both Attorneys for Lawrence K. Hubbell.

Respectfully submitted,

/s/ REBECCA HAZELETT-COOK
Attorney for Plaintiffs

RHC:rhc

LETTER ON BEHALF OF RESPONDENTS COMBUSTION ENGINEERING DATED MARCH 12, 1987, RESPONDING TO PETITIONERS' LETTER OF MARCH 1, 1987 AND DEFINING A CONFLICT BETWEEN THE SIXTH AND SEVENTH CIRCUIT ON IMMUNITY UNDER THE NOERR-PENNINGTON DOCTRINE

In Canton
ARTER & HADDEN
640 Citizens Savings Building
Canton, Ohio 44702
216/453-1166
Telecopier 216/453-2364

In Dallas
ARTER, HADDEN & WITTS
5353 Renaissance Tower
Dallas, Texas 75270
214/741-7561
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Cleveland, Ohio 44115
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In Washington
ARTER & HADDEN
1919 Pennsylvania Avenue, N.W.
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Please Respond to:
Cleveland

March 12, 1987

The Honorable David D. Dowd, Jr.
United States District Court
Northern District of Ohio
Federal Building, U.S. Courthouse
2 South Main Street
Akron, Ohio 44308

Re: *Lester Smith, et al. v.*
Combustion Engineering, Inc., et al.
Case No. C85-3451A

Mr. dear Judge Dowd:

On March 4, 1987, as counsel for the Combustion Engineering defendants, I received correspondence from plaintiffs' counsel raising, purportedly for the first time, two opinions discussing the applicability of the *Noerr-Pennington* doctrine to certain situations.

This most recent correspondence is the fourth written communication by plaintiffs' counsel to this Court concerning this issue, including a Brief in Opposition to Defendants' Motion for Summary Judgement, a "Further Answer Brief," and a pleading captioned a "Request for Reconsideration." With all respect to plaintiffs' counsel, this latest letter does not contribute to the resolution of this matter and, in point of fact, does not raise authority having any bearing whatever on this controversy.

The Combustion Engineering defendants cited and relied upon *Westmac, Inc. v. Smith*, 797 F.2d 313 (6th Cir. 1986), at pages 9 and 12 through 14 of their Reply Brief in Support of Motion for Summary Judgment. Indeed, in footnote 10 on page 13 of that brief, these defendants even made reference to Judge Merritt's dissenting opinion, which plaintiffs' counsel cite in their letter. Particularly in light of the subsequent Sixth Circuit opinion in *Potters Medical Center v. City Hospital Association*, 800 F.2d 568 (6th Cir. 1986), reaffirming the application of the *Noerr-Pennington* doctrine in cases such as this, it cannot be said that Judge Merritt's dissent states the law in this jurisdiction.

On equal footing is the Seventh Circuit's decision in *Grip-Pac, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983), a case in

which the defendant had brought a series of unsuccessful lawsuits against the plaintiff. Not only is *Grip-Pac* distinguishable on its facts, it also does not state the law in this jurisdiction in as much as the majority in *Westmac* rejected the reasoning of *Grip-Pac*. Based upon the Sixth Circuit's unanimous opinion in *Potters Medical*, a case much more analogous to the present one than *Grip-Pac*, the Combustion Engineering defendants' actions were immune from liability under the *Noerr-Pennington* doctrine.

This Court correctly decided on January 27, 1987, that plaintiffs' claims herein are barred under the *Noerr-Pennington* doctrine. Plaintiffs' late reliance on inapplicable authority from another jurisdiction and a single dissent from the Sixth Circuit provides no basis to change that conclusion. Defendants therefore respectfully request that plaintiffs' "Request for Reconsideration" be denied.

Respectfully submitted,

WALTER A. BATES

WAB:dm

cc: Mack D. Cook, II, Esq.
Rebecca Hazelett-Cook, Esq.
James J. Dyson, Esq.

PETITIONERS' COMPLAINT FILED NOVEMBER 18, 1985 IN DISTRICT COURT

Case No.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH

and

WESTERN RESERVE GROUP, INC.,
c/o Lester W. Smith, President,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., C-E CAST EQUIPMENT, JAMES F. CALVERT, GEORGE E. FISHER, JR., LAWRENCE K. HUBBEL, EDWIN M. KAVANAGH, JAMES B. KELLY, JAMES E. KLIMA, c/o VETCO-GRAY, THOMAS E. McGRANAHAN, c/o C-E CAST EQUIPMENT, WILLIAM FRANCIS ROCHE, ARTHUR J. SANTRY, JR., c/o COMBUSTION ENGINEERING, INC., FG DOE, EN ROE, JB LOE,
Defendants.

COMPLAINT
CIVIL RIGHTS AND ANTITRUST VIOLATIONS

DEMAND FOR JURY TRIAL
ENDORSED HEREON

ALLEGATIONS OF JURISDICTION

1. This action is brought under Title 15 U.S.C. §22, and Title 28 U.S.C. §1331, §1332 and §1343.

2. This action is timely filed by virtue of Title 15 U.S.C. §15b and Ohio Revised Code §2305.09 (four year statutes of limitation).

ALLEGATIONS AS TO THE PARTIES

3(a). Plaintiff Lester W. Smith is a citizen of the State of Ohio and on December 8, 1981 was the owner and occupant, together with Mrs. Patricia Smith, of a home and residential dwelling at 310 Simon Road, Hudson (Summit County) Ohio 44236; and now still resides at said address.

(b). In 1981, Lester W. Smith, by reason of formal education and extensive work experience, was well qualified to function as a manager of or as a consultant or advisor to a company doing business in the metal-working industry, including a company doing business in the design, manufacture and sale of foundry machines and equipment and of replacement parts therefor.

(c). During 1970-1976, Lester W. Smith functioned as Vice President and General Manager of defendant C-E Cast Equipment, and when he left the company he was not subject to a noncompetition covenant.

(d). During 1977, Lester W. Smith functioned as Vice President—European Operations, the Herman Corporation, Zelienople, Pennsylvania, a competitor of defendant C-E Cast Equipment in the design, manufacture and sale of foundry machines and equipment and of replacement parts therefor.

(e). In 1978, Lester W. Smith returned to work in the Cleveland-Akron area as Vice President and General Manager, the H.K. Ferguson Company, Hale and Kullgren Division, Akron, Ohio, an Architect/Engineer, Construction/Construction Management firm providing consulting services for domestic and international clients.

(f). During May, 1978, Lester W. Smith to further improve his personal financial situation decided to draw on his experience as a manager of or as a consultant or advisor to a company doing business in the design, manufacture and sale of foundry machines and equipment and of replacement parts therefor and became a shareholder in, and a Director and President of the company which is now known as plaintiff, Western Reserve Group, Inc.

4(a). Plaintiff Western Reserve Group, Inc. was incorporated as an Ohio Corporation in May, 1978 as Western Reserve Parts, Inc.; the name of said plaintiff was changed to Western Reserve Group, Inc. in June, 1978; and the primary business purpose of said plaintiff, as set forth in the Articles of Incorporation was—

> To engage in buying, selling, leasing and production by manufacture or otherwise of foundry machines and equipment and of replacement parts, machines and equipment of every nature and description related to the foundry industry, and to do and perform all things incidental or necessary to the purposes above set forth;

(b). Lester W. Smith, is President of plaintiff Western Reserve Group, Inc. and is now duly authorized to speak for and represent said corporation in this action.

(c). In 1981, plaintiff Western Reserve Group, Inc. had an office and principal place of business at 310 Simon Road, Hudson (Summit County) Ohio, 44326.

5. Defendant Combustion Engineering, Inc. is a corporation, with corporate headquarter offices at 900 Long Ridge Road, Stamford, Connecticut 06902.

6(a). Defendant C-E Cast Equipment, located at 7887 Hub Parkway, Cleveland (Valley View) Ohio 44125, is a division of defendant Combustion Engineering, Inc.

6(b). Defendant C-E Cast Equipment manufactures foundry molding and related equipment and replacement parts for such equipment, for industries such as the automotive and heavy equipment industries, and for customers such as Ford Motor Company, General Motors, Chrysler, International Harvester, John Deere and Caterpillar.

7. Defendant James F. Calvert was Vice President—Operations of defendant Combustion Engineering, Inc. in 1981 and retired from Combustion Engineering, Inc. at the end of 1983.

8. Defendant George E. Fisher, Jr. was Manager of Customer Service for defendant C-E Cast Equipment in 1981.

9. Defendant Lawrence K. Hubbel was President of Royalton Manufacturing, Inc., located at 12166 York Road, Cleveland (North Royalton) Ohio, 44133, in 1981.

10. Defendant Edwin M. Kavanagh was Vice President—Replacement Parts Division of defendant C-E Cast Equipment from 1978 to at least October 7, 1982.

11. Defendant James B. Kelly was an officer of defendant Combustion Engineering, Inc. in 1981 and is now Vice President in charge of Industrial Group of Combustion Engineering, Inc.

12. Defendant James E. Klima was Vice President and Comptroller of defendant C-E Cast Equipment in 1981.

13. Defendant Thomas E. McGranahan was employed by defendant C-E Cast Equipment in 1975 and in 1981 was a senior sales coordinator, or sales representative, for defendant C-E Cast's Replacement Parts Division.

14. Defendant William Francis Roche was President of defendant C-E Cast Equipment from early 1975 on through until about the first of April 1982 and is now President of Basic Incorporated which is a wholly owned subsidiary of defendant Combustion Engineering, Inc.

15. Defendant Arthur J. Santry, Jr., was President of defendant Combustion Engineering, Inc. in 1981 and has been the chairman of the Board of Combustion Engineering, Inc. since April 24, 1984.

16. Defendant FG Doe had an office in Cleveland, Ohio in 1981.

17. Defendant EN Roe had an office in Akron, Ohio in 1981.

ALLEGATIONS COMMON TO ALL COUNTS

18. At the times made relevant by the allegations set forth below, the defendants James F. Calvert and/or James B. Kelly and/or Arthur J. Santry, Jr., as business persons and as officers of defendant Combustion Engineering, Inc., did have corporate control of and personal accountability for the conduct and acts of defendants James E. Klima, Edwin M. Kavanagh and William Francis Roche, as business persons and as officers of defendant C-E Cast Equipment.

19. Sometime in early 1981, at a date plaintiffs have not yet determined, defendant Edwin M. Kavanagh made an internal investigation within defendant C-E Cast Equipment and learned that Defiance, Illinois Central Foundry, which is a division of General Motors, had contacted C-E Cast Equipment indicating that they would not be buying their normal regular replacement parts from C-E Cast Equipment, because they had found an outside supplier who would provide most of the replacement parts at a reduced price.

20. On or about August 6, 1981, at the suggestion of a person or persons in the corporate organization of defendant Combustion Engineering, Inc., whose specific identity is as yet unknown but is believed by plaintiff Lester W. Smith to be one or more of the defendants, James F. Calvert, James B. Kelly and Arthur J. Santry, Jr., defendant Edwin M. Kavanagh signed a contract to hire on behalf of defendant C-E Cast Equipment a private investigation firm, Niam Investigations, 277 South Broadway, Akron, Ohio 44308 to conduct the balance of the investigation.

21. After August 6, 1981, said Niam Investigations reported to defendants Edwin M. Kavanagh, William Francis Roche and James E. Klima.

22. At sometime after August 6, 1981 and prior to December 7, 1981, defendant Edwin M. Kavanagh did cause said Niam Investigations to make an investigation at the home and residence of plaintiff Lester W. Smith in Hudson, Ohio, including a search and examination of garbage disposed of at the Lester W. Smith home.

23. The investigation of plaintiff The Western Reserve Group, Inc. that began in 1981 was under the leadership of and with the very definite approval of defendant William Francis Roche, who was consulted and agreed with the decision to retain said Niam Investigations.

24. At all times relevant to this action, the investigation by said Niam Investigations of the business activities of plaintiffs was a licensed activity under color of state law; Ohio Revised Code Chapter 4749, Private Investigators.

25. In 1981, Royalton Manufacturing, Inc. was physically producing parts to be sold by plaintiff Western Reserve Group, Inc. in competition with defendant C-E Cast Equipment; and on or after September 10, 1981, defendant Edwin M. Kavanagh did ask for and defendant Lawrence K. Hubbel did willingly provide to defendant C-E Cast Equipment documents and sales records relating to the business activities of Western Reserve Group with Royalton Manufacturing: Including over seventy detailed drawings; copies of Western Reserve Group purchase orders with quantity and purchase price information; Royalton Manufacturing invoices with quantity and delivery price information; and copies of checks that were signed by a Lester W. Smith.

26. Thereafter, as to the checks received from Royalton Manufacturing, Inc., defendant Edwin M. Kavanagh took documents from the files of defendant C-E Cast Equipment and had a technical specialist, a Dr. Bouffard, identify that the handwriting did belong, to the best of his knowledge, to plaintiff Lester W. Smith.

27. At sometime after August 6, 1981 and prior to December 7, 1981, defendant Edwin M. Kavanagh and a person from Niam Investigations did go to the office of Frank C. Gasper, an assistant county prosecutor in the office of John T. Corrigan, Prosecutor for Cuyahoga County, in Cleveland, Ohio.

28. At sometime prior to December 7, 1981, several identical affidavits were prepared by prosecutor Frank C. Gasper for the signature of defendant Edwin M. Kavanagh: Said affidavits being based solely or completely based upon information conveyed to or provided by defendant Edwin M. Kavanagh and a person from said Niam Investigations.

29. Paragraphs 9 A and C of said affidavits are based upon incorrect [and] misleading information in a sworn statement of defendant Thomas E. McGranahan given, at a date as yet unknown to plaintiffs, to defendant Edwin M. Kavanagh and one or more attorneys, whose names are as yet unknown to plaintiffs, with the law firm of Arter & Hadden, now at 1100 Huntington Building, Cleveland, Ohio 44115.

30. One of said affidavits was signed by defendant Edwin M. Kavanagh in the presence of a Judge, Court of Common Pleas, Summit County, on December 7, 1981 as establishing the grounds for issuing a search warrant pursuant to Ohio Rules of Criminal Procedure, Rule 41.

31. On December 7, 1981, it was the intention or purpose or objective of defendant Edwin M. Kavanagh that all of the property of plaintiff Western Reserve Group, Inc., then within the home and residence of plaintiff Lester W. Smith be seized on behalf of defendant C-E Cast Equipment.

32. A search within the home and residence of plaintiff Lester W. Smith was made in the early morning of December 8, 1981 and property belonging to Lester W. Smith and plaintiff Western Reserve Group, Inc. was seized and taken away, never to be returned by defendant Edwin M. Kavanagh or anyone.

33. Subsequent to said search and seizure, defendant Edwin M. Kavanagh and/or person from Niam Investigations arranged for or procured extensive media reporting and coverage as to the allegations of defendant C-E Cast Equipment against plaintiffs Lester W. Smith and personnel of Western Reserve Group, Inc.; said media reporting and coverage began on December 8, 1981 with the 6:00 PM TV Channel 3 news showing the home and residence of Lester W. Smith, and continued

with a variety of stories in the print media and climaxed with the 6:00 PM and 11:00 PM TV Channel 3 news on January 13, 1984 showing Lester W. Smith in the Court of Common Pleas, Cuyahoga County, Ohio, and followed by stories in the print media on January 14, 1984.

FIRST COUNT

34. This count generally states a cause of action against the defendants herein for tortious conduct and acts in concert or conspiracy with persons acting under color of state law and involving: A trespass upon real property owned by plaintiff Lester W. Smith; a taking and detaining of personal property owned by Lester W. Smith and plaintiff Western Reserve Group, Inc.; and an injury to the civil rights of Lester W. Smith and Western Reserve Group, Inc.

35. This count specifically states a cause of action against the defendants herein, for tortious conduct and acts in concert or conspiracy with persons acting under color of state law and arising under Title 42 U.S.C. §1983 reading in relevant part—

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State. . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law—;

plaintiff Lester W. Smith being a "citizen"; plaintiff Western Reserve Group, Inc. being an "other person."

36. An affidavit signed by defendant Edwin M. Kavanagh December 7, 1981 was the sole and only basis and reason for a search warrant given by a Judge, Court of Common Pleas, Summit County, Ohio, on December 7, 1981, 3:18 PM.

37. Said affidavit was defective because it was in violation of AMENDMENT IV to the United States Constitution—

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized—;

and contrary to the relevant part of Ohio Rules of Criminal Procedure, Rule 41(C)—

> A warrant shall issue . . . only on an affidavit . . . sworn to before a judge . . . and establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located . . .

38. Said search warrant was improperly issued because said affidavit was defective.

39. Said improperly issued search warrant was directed to various law enforcement officers including the person Det. Sgt. Larry Momchilov, a member of the Sheriff's Department for Summit County, Ohio.

40. Said improperly issued search warrant was served and executed on plaintiff Lester W. Smith at his home land residence 310 Simon Road, Hudson, Ohio by Det. Sgt. Larry Momchilov, at 7:05 AM December 8, 1981.

41. An unreasonable search for and seizure of the property of plaintiffs Lester W. Smith and Western Reserve Group, Inc. located within the house and garage

at 310 Simon Road, Hudson, Ohio made without the consent of Lester W. Smith was carried out by a search team lead by Det. Sgt. Larry Momchilov and comprising: Defendant George E. Fischer, Jr.; a person Edward Niam from Niam Investigations; and a person named Cheryl Lehman from Niam Investigations.

42. When said search term entered his house at 7:05 AM on December 8, 1981, Lester W. Smith recognized a T.V. Channel 3 Minicam vehicle or van at the end of the driveway.

43. Said search team left the house of plaintiff Lester W. Smith at about 11:15 AM December 8, 1981 and took with them several boxes or plastic bags containing at least sixty seven (67) categorized items of documents and records: At least twenty one (21) of said categorized items being of a nature personal to Lester W. Smith or unrelated to the business activities of Western Reserve Group, Inc.

44. By virtue of Title 42 U.S.C. §1988 the allegations of this Count also state a violation of the Constitution of the State of Ohio, Article I §1, Inalienable Rights—

> All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety—;

and Article I §14, Search Warrants—

> The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized.

45. For the reasons set forth in the specific allegations of this Count, and by general allegations elsewhere in this Complaint, plaintiffs Lester W. Smith and Western Reserve Group, Inc. have been injured as to their civil rights and property and they now claim an award of damages, actual and punitive, pursuant to Title 42 U.S.C. §1983 and an allowance of a reasonable attorney's fee as part of the costs pursuant to Title 42 U.S.C. §1988.

SECOND COUNT

46. This Count generally states a cause of action on behalf of plaintiff Western Reserve Group, Inc. arising under Sections 1 and 2 of the Sherman Act, Title 15 U.S.C. §§1 and 2, and the antitrust laws of the United States.

47. With reference to ¶¶'s 18, 19, 20 and 21 above, acting on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, the defendants Edwin M. Kavanagh, William Francis Roche or James E. Klima did enter into a contract with said Niam Investigations with a specific intent to acquire monopoly power in restraint of trade and to control price and to foreclose competition in the United States for products in the relevant market and the actual market, as defined in ¶¶'s 51 and 52 below.

48. With reference to ¶25 above, acting on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, the defendants Edwin M. Kavanagh and Lawrence K. Hubbel did conspire with a specific intent to acquire monopoly power in restraint of trade and to control price and to foreclose competition in the United States for products in said relevant market and said actual market.

49. With reference to ¶¶27, 28, 29 and 30 above, acting on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, the defendant Edwin M. Kavanagh did conspire with said prosecutor Frank C. Gasper with a specific intent to acquire monopoly power in restraint of trade and to control price and to foreclose competition in the United States for products in said relevant market and said actual market.

50. Additionally or in the alternative, on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, the conduct and acts of persons named as defendants herein, or as otherwise named, were deliberate and with the general intent or purpose to possess or attempt to possess monopoly power in said relevant market and said actual market and to maintain that monopoly power by willful acquisition as distinguished from growth or development as a consequence of a superior product, business accumen, or historical accident.

51. The relevant market in trade or commerce within the United States is replacement parts, also known as wear parts, further known as spare parts, for each line or collection of foundry molding and related equipment manufactured and sold by defendants Combustion Engineering, Inc. and C-E Cast Equipment to customers.

52. The actual market for said replacement parts are the owners of at least one hundred and thirty five (135) lines or collections of foundry molding and related equipment which had been manufactured and sold by defendant C-E Cast Equipment to customers as of 1980; of which lines approximately eighty percent (80%) were operational in 1982.

53. In 1981, plaintiff Western Reserve Group, Inc. was a direct competitor of defendant C-E Cast Equipment in said relevant market and said actual market.

54. In 1981, the defendant William Francis Roche knew that the individuals working for plaintiff, Western Reserve Group, Inc. were competing with defendant C-E Cast Equipment and were trying to sell to the same customers.

55. The conduct and acts of persons named as defendants herein, or as otherwise named, have on December 8, 1981 occasioned or caused the office of Lester W. Smith, President of plaintiff Western Reserve Group, Inc. to be subjected to a search and seizure.

56. On December 8, 1981, it was the intention or purpose or objective of defendant Edwin M. Kavanagh that virtually all of the property of plaintiff Western Reserve Group, Inc. be seized by a search of the office of Lester W. Smith and by searches and seizures at other locations on the same day.

57. After virtually all the property of plaintiff Western Reserve Group, Inc. was seized on December 8, 1981, said property was delivered into the custody of said Frank C. Gasper, the assistant prosecutor of Cuyahoga County, so that it was impossible for anyone to continue to conduct the business of Western Reserve Group, Inc. in competition with defendants Combustion Engineering, Inc. and C-E Cast Equipment.

58. The conduct and acts of persons named as defendants herein, or as otherwise named, has totally or completely destroyed the business of plaintiff Western Reserve Group, Inc. as an active or viable competitor of

defendants Combustion Engineering, Inc. and C-E Cast Equipment in said relevant market and said actual market.

59. For the reasons set forth in the specific allegations of this Count, and by general allegations elsewhere in this Complaint, plaintiff Western Reserve Group, Inc. has had injury inflicted upon its business and property and it now claims an award for recovery of threefold the damages by it sustained, and the cost of suit, including a reasonable attorney's fee pursuant to Title 15 U.S.C. §15.

THIRD COUNT

60. This Count states a cause of action on behalf of plaintiff Lester W. Smith, as a person and not as a shareholder in or as a Director and President of plaintiff Western Reserve Group, Inc.

61. This Count states a cause of action arising under Sections 1 and 2 of the Sherman Act, Title 15 U.S.C. §§1 and 2, and the antitrust laws of the United States.

62. The relevant market in trade or commerce within the United States is the ability of plaintiff Lester W. Smith to function as a manager of or as a consultant or advisor to a company doing business in the design, manufacture and sale of foundry machines and equipment and of replacement parts therefor: The ability of Lester W. Smith to offer and perform "personal services."

63. With references to ¶¶'s 18, 19, 20, 21 and 22 above, acting on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, the defendants Edwin M. Kavanagh, William Francis Roche

and James E. Klima did enter into a contract with said Niam Investigations with a specific intent to acquire monopoly power in restraint of trade and to control the ability of plaintiff Lester W. Smith to function in said relevant market.

64. With reference to ¶¶'s 25 and 26 above, acting on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, the defendants Edwin M. Kavanagh and Lawrence K. Hubbel did conspire with a specific intent to acquire monopoly power in restraint of trade and to control the ability of plaintiff Lester W. Smith to function in said relevant market.

65. With reference to ¶¶'s 27, 28, 29 and 30 above, acting on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, the defendant Edwin M. Kavanagh did conspire with said prosecutor Frank C. Gasper with a specific intent to acquire monopoly power in restraint of trade and to control the ability of plaintiff Lester W. Smith to function in said relevant market.

66. Additionally or in the alternative, on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, the conduct and acts of persons named as defendants herein, or as otherwise named, were deliberate and with the general intent or purpose to possess or attempt to possess monopoly power to control the ability of plaintiff Lester W. Smith to function in said relevant market and to maintain that monopoly power by willful acquisition.

67. With reference to ¶32 above, the conduct and acts of persons named herein, or as otherwise named, have on December 8, 1981 caused the home and residence of plaintiff Lester W. Smith to be raided.

68. With reference to ¶33, above, there was extensive media reporting and coverage about and concerning plaintiff Lester W. Smith in the time period from December 8, 1981 to January 14, 1984.

69. Sometime after December 8, 1981 and prior to January 13, 1982, a person Richard R. Edmister, Esq. now general counsel for H.K. Ferguson Co., One Erieview Plaza, Cleveland, Ohio 44314, did speak with said Frank C. Gasper regarding a possible indictment of plaintiff Lester W. Smith by the Grand Jury of Cuyahoga County: On January 13, 1982, Lester W. Smith was discharged from employment at the H.K. Ferguson Co., Hale and Kullgren Division, Akron, Ohio.

70. In January, 1982, the said Frank C. Gasper at the urging of defendant Edwin M. Kavanagh and with the assistance of Edward Niam of Niam Investigations did appear before the Grand Jury of Cuyahoga County to give information pursuant to Ohio Revised Code §2939.10 and to obtain the indictment of plaintiff Lester W. Smith under Ohio Revised Code §2939.20: Said indictment having been Constitutionally defective and therefore null and void because evidence submitted by said Frank C. Gasper to said Grand Jury had been unlawfully or improperly seized.

71. On February 22, 1982, plaintiff Lester W. Smith did enter a plea of not guilty to four counts in said indictment: But because of media reporting and coverage prior to said not guilty plea, Lester W. Smith believed that there was no realistic or reasonable expectation of continuing, restoring or reviving his ability to function in said relevant market.

72. On January 13, 1984, plaintiff Lester W. Smith remained at peril under threat of the continually postponed trial on said four count indictment, he was

still awaiting ruling by a judge, Court of Common Pleas, Cuyahoga County, on motions to suppress evidence and to dismiss said indictment regarding which testimony and evidence had been presented to said Court during bifurcated hearings at various times between October 7, 1982 to December 20, 1982, he had no regular employment, his personal funds and assets available to further retain counsel for his defense were exhausted: So that Lester W. Smith had no other realistic or viable option than to accept coercive plea bargain arrangements that had been presented by said Frank C. Gasper, at the request of defendant Edwin M. Kavanagh or other persons, on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment.

73. Said plea bargain arrangements included a document encaptioned Plea Agreement which read in relevant parts—

> (1) Lester Smith will be allowed to enter a plea of guilty to the lesser and included offense of Count III of the indictment, to wit: receiving stolen property of a value less than One Hundred Fifty Dollars ($150.00) in violation of Ohio Revised Code Section 2913.51. All other counts in the indictment will be nollied [sic] and dismissed.
>
> (2) The Court will accept a waiver of indictment submitted by Lester Smith on behalf of The Western Reserve Group, Inc. and will also accept a plea of guilty entered by Lester Smith to a one count information charging The Western Reserve Group, Inc. with a violation of Ohio Revised Code Section 1333.51.
>
> (3) The Court shall impose a sentence on Lester Smith of six months in the Cuyahoga County Jail and a One Thousand Dollar ($1,000.00) fine, imposition of the jail sentence shall be suspended and Lester Smith shall be placed on one year

probation. It shall be a condition of probation that Lester Smith will pay restitution in the amount of Twenty-Five Thousand Dollars ($25,000.00) directly to Combustion Engineering, Inc. or its designated agent; Five Thousand Dollars ($5,000.00) of which shall be payable on or before January 6, [sic] 1984 and the remaining Twenty Thousand Dollars ($20,000.00) shall be paid on or before January 6, [sic] 1984 as evidenced by a Promissory Note executed by Lester W. Smith.

(4) The Court shall impose a fine of Five Thousand Dollars ($5,000.00) on The Western Reserve Group, Inc.

74. As a calculated or direct and planned for benefit of ¶3 of said Plea Agreement, on behalf of defendants Combustion Engineering, Inc. and C-E Cast Equipment, defendant James B. Kelly was able to extend the monopoly power to control the ability of plaintiff Lester W. Smith to function in said relevant market to at least March 13, 1987: And probably thereafter for an appreciable period of years.

75. On March 13, 1984, on the letterhead of defendant Combustion Engineering, Inc., defendant James B. Kelly, sent a letter to plaintiff Lester W. Smith coercively offering to cancel the Promissory Note for $20,000, as called for in the last sentence of ¶3 of said plea bargain arrangement, as of March 13, 1987 if and in the event that Lester W. Smith would accept and agree to a noncompetition covenant.

76. Plaintiff Lester W. Smith had no viable option other than to accept said noncompetition covenant, which reads—

For a period of three (3) years ending upon the third anniversary of the date hereof, you agree that you will not, without C-E's prior written consent,

directly or indirectly, on a full or part time basis, or on a consulting or advisory basis, or otherwise, compete with, or aid any person, firm or corporation in any business activity which is competitive with C-E's foundry equipment and/or foundry products businesses as presently conducted by C-E's C-E Cast Equipment and C-E Cast Products Divisions.

77. For the reasons set forth in the specific allegations of this Count, and by general allegations elsewhere in this Complaint, plaintiff Lester W. Smith has had injury inflicted upon his business and property and he now claims an award for recovery of threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee pursuant to Title 15 U.S.C. §15.

PRAYER

I. Plaintiff Lester W. Smith demands judgment on the FIRST COUNT in the amount of $4,000,000.00 plus interest accrued and accruing thereon, plus costs and attorney's fees.

II. Lester W. Smith, on behalf of plaintiff Western Reserve Group, Inc., demands judgment on the FIRST COUNT in the amount of $1,000,000.00 plus interest accrued and accruing thereon, plus costs and attorney's fees.

III. Lester W. Smith, on behalf of plaintiff Western Reserve Group, Inc. demands judgment on the SECOND COUNT in the amount of $6,000,000.00 trebeled plus interest accrued and accruing thereon, plus costs and attorney's fees.

IV. Plaintiff Lester W. Smith demands judgment on the THIRD COUNT in the amount of $1,000,000.00 trebeled plus interest accrued and accruing thereon, plus costs and attorney's fees.

/s/ MACK D. COOK, II
900 First National Tower
Akron, Ohio 44308
(216) 376-1005
Attorney for Plaintiffs

of Counsel:
Rebecca Hazelett-Cook
900 First National Tower
Akron, Ohio 44308
(216) 376-1005

VERIFICATION

Lester W. Smith, says that he has read the allegations contained in the Complaint, and that they are true as he verily believes and to the best of his knowledge.

/s/ LESTER W. SMITH
310 Simon Road
Hudson, Ohio 44236

JURY DEMAND

Plaintiffs demand a trial by jury of any and all issues triable of right by a jury.

/s/ LESTER W. SMITH

PETITIONERS' AMENDED COMPLAINT FILED JULY 22, 1985

Case No. C85-3451A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

AMENDMENT TO THE COMPLAINT

ADDITIONAL ALLEGATIONS AS TO THE FIRST COUNT (COMPLAINT ¶¶s 34-45)

78. Beginning on December 8, 1981 and continuing to and until January 13, 1984, intentional acts and wrongful or offensive conduct of the defendants herein, in concert or conspiracy with persons acting under color of state law, did cause injury and damage to the civil rights of plaintiff Lester W. Smith in that:

(a) he suffered loss of employment and income;

(b) he paid expensive attorney's fees;

(c) he was the subject of public disgrace and humiliation;

(d) he was humbled into pleading guilty to a criminal offense; and,

(e) he was burdened by the psychological trauma of over two years of uncertainties.

79. The effects of the injury and damages to the civil rights of plaintiff Lester W. Smith as set forth in paragraph 78, above, have caused him to suffer enormously, have continued from January 13, 1984 to this date and will continue into the foreseeable future.

80. Because of the injury and damage to the civil rights of plaintiff Lester W. Smith as set forth in paragraph 78, above, his condition or state of mind prior to and on January 13, 1984 was not good but was bad.

LESTER W. SMITH
By /s/ MACK D. COOK, II
900 First National Tower
Akron, Ohio 44308
(216) 376-1005
Attorney for Plaintiffs

Of Counsel:

/s/ REBECCA HAZELETT-COOK
900 First National Tower
Akron, Ohio 44308
(216) 376-1005

VERIFICATION

Lester W. Smith, says that he has read the additional allegations, ¶¶'s 78, 79 and 80, in the foregoing AMENDMENT TO THE COMPLAINT, and that they are true as he verily believes and to the best of his knowledge.

/s/ LESTER W. SMITH
310 Simon Road
Hudson, Ohio 44236

15 U.S.C. §22

District in which to sue corporation

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

(Oct. 15, 1914, c. 323, §12, 38 Stat. 736.)

20 U.S.C. §1331

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, ch 646, §1, 62 Stat. 930; July 25, 1958, P. L. 85-554, §1, 72 Stat. 415; Oct. 21, 1976, P. L. 94-574, §2, 90 Stat. 2721; Dec. 1, 1980, P. L. 96-486, §2(a), 94 Stat. 2369.)

28 U.S.C. §1332

Diversity of citizenship

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) Citizens of different States;

* * * * *

(June 25, 1948, ch 646, §1, 62 Stat. 930; July 26, 1956, ch 740, 70 Stat. 658; July 25, 1958, P. L. 85-554, §2, 72 Stat. 415; Aug. 14, 1964, P. L. 88-439, §1, 78 Stat. 445; Oct. 21, 1976, P. L. 94-583, §3, 90 Stat. 2891.)

28 U.S.C. §1343

Civil rights

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, ***

(June 25, 1948, c. 646, §1, 62 Stat. 932; Sept. 3, 1954, c. 1263, §42, 68 Stat. 1241; Sept. 9, 1957, P. L. 85-315, Part III, §121, 71 Stat. 637.)

15 U.S.C. §15b

Limitation of actions

Any action to enforce any cause of action *** shall be forever barred unless commenced within four years after the cause of action accrued.

(Oct. 15, 1914, ch 323, §4B, as added July 7, 1955, ch 283, §1, 69 Stat. 283; Sept. 30, 1976, P. L. 94-435, Title III, §302(1), 90 Stat. 1396.)

OHIO REVISED CODE §2305.09

Four years; certain torts

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

* * * * *

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

* * * * *

HISTORY: 129 v 13, eff. 7-1-62
1953 H 1; GC 11224

UNITED STATES CONSTITUTION

AMENDMENT 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

OHIO CONSTITUTION

ARTICLE I, §1

I §1 Inalienable rights

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

HISTORY: 1851 constitutional convention, adopted eff. 9-1-1851

OHIO CONSTITUTION, ARTICLE I §14

ARTICLE I §14

I §14 Search warrants

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by

* * *

42 U.S.C. §1983

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(R. S. §1979; Dec. 29, 1979, P. L. 96-170, §1, 93 Stat. 1284.)

42 U.S.C. §1988

§1988. Proceedings in vindication of civil rights

The jurisdiction in civil *** conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," *** for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

* * *

(R. S. §722; Oct. 19, 1976, P. L. 94-559, §2, 90 Stat. 2641.)

OHIO REVISED CODE §4749.01

CHAPTER 4749

PRIVATE INVESTIGATORS

4749.01 Definitions

As used in sections 4749.01 to 4749.10, inclusive, of the Revised Code:

(A) "Private investigator" means any person who engages in the business of private investigation, as an individual, a partner, or an officer of a corporation.

(B) "Business of private investigation" means, *** engaging in any of the following for hire:

* * *

(2) Conducting any investigation relevant to any crime or wrong done or threatened, or to obtain information on the identity, habits, conduct, movements, whereabouts, affiliations, transactions, reputation, credibility, or character of any person, or to locate and recover lost or stolen property, or to determine the cause of or responsibility for any libel or slander, or any fire, accident, or damage to property, or to secure evidence for use in any legislative, administrative, or judicial investigation or proceeding.

* * * * *

HISTORY: 1969 H 341, eff. 1-1-70

PROSSER, THE LAW OF TORTS, FOURTH EDITION, WEST PUBLISHING CO. (1971), CHAPTER 3, 13, p. 63

TRESPASS TO LAND

The law pertaining to trespass upon land has been described as "both exceptionally simple and exceptionally rigorous." In the eyes of the common law, every unauthorized entry upon the soil of another was a trespass, "for the law bounds every man's property and is his fence."

(fn. omitted)

PROSSER, THE LAW OF TORTS, FOURTH EDITION, WEST PUBLISHING CO. (1971), CHAPTER 3, 14, p. 76

TRESPASS TO CHATTELS

The earliest cases in which the action of trespass was applied to chattels involved asportation, or carrying off, and a special form of the writ, known as trespass de bonis asportatis, was devised to deal with such situations. *** Later decisions extended the tort to include any direct and immediate intentional interference with a chattel in the possession of another. Thus it is a trespass to damage goods or destroy them, to make an unpermitted use of them, or to move them from one place to another. Under the common law forms, the interference must be direct and forcible, otherwise the action must be on the case; but as in the case of trespass to land, the tendency has long been to ignore any such artificial distinction.

The later development of the common law action of trover, and the tort of conversion[48] provided a substitute for trespass which usually was the more convenient action.

(fn. omitted)

PROSSER, THE LAW OF TORTS, FOURTH EDITION, WEST PUBLISHING CO. (1971), CHAPTER 3, 15, pp. 79, 80, 83 and 87

CONVERSION

Conversion is a fascinating tort, although it has largely eluded the attention of legal writers. Highly technical in its rules and complications, *** it almost defies definition. The chief reason is that the hand of history, with its old common law forms of action, lies heavy upon this particular field.

Although the term had made some earlier appearances, conversion had its real genesis in the old common law action of trover.

* * *

What May Be Converted

What property may be the subject of an action for conversion was at first determined on the basis of the fiction of losing and finding. Any tangible chattel could be found, and so could be converted.

* * *

Once there was severance, however, such goods became personal property, and trover could be maintained for their removal from the land.

* * *

Character of Defendant's Act

A conversion can result only from conduct intended to affect the chattel.

* * *

The intent required is not necessarily a matter of conscious wrongdoing. It is rather an intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights.

* * *

Transferring Possession

Perhaps the most common way in which conversion is committed is by an unauthorized transfer or disposal of possession of the goods to one who is not entitled to them. Normally this is a sufficiently serious interference with the true owner's right of control, although cases are possible in which the consequences of an innocent mistake are so unimportant that conversion will not be found.

PROSSER, THE LAW OF TORTS, FOURTH EDITION, WEST PUBLISHING CO. (1971), CHAPTER 22, 121, pp. 121-122

ABUSE OF PROCESS

* * *

Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance. Consequently in an action for abuse of process it is unnecessary for the plaintiff to prove that the proceeding has terminated in his favor, or that the process was obtained without probable cause or in the course of a proceeding begun without probable cause.

* * *

The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding.

(fn. omitted)

15 U.S.C. §1

§1. Trusts, etc., in restraint of trade illegal.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

* * * * *

(July 2, 1890, ch 647, §1, 26 Stat. 209; Aug. 17, 1937, ch 690, Title VIII, §1, 50 Stat. 693; July 7, 1955, ch 281, 69 Stat. 282; Dec. 21, 1974, P. L. 93-528, §3, 88 Stat. 1708; Dec. 12, 1975, P. L. 94-145, §2, 89 Stat. 801.)

15 U.S.C. §2

§2. Monopolizing trade.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty.

* * *

(July 2, 1890, ch 647, §2, 26 Stat. 209; July 7, 1955, ch 281, 69 Stat. 282; Dec. 21, 1974, P. L. 93-528, §3, 88 Stat. 1708.)

FEDERAL RULES OF CIVIL PROCEDURE 9(b)

Rule 9. Pleading Special Matters

* * * * *

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

OHIO REVISED CODE §2939.18

2939.18 Fact of indictment shall be kept secret

No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person not in custody or under bail, before such indictment is filed and the case docketed, except by the issue of process.

HISTORY: 1953 H 1, eff. 10-1-53
GC 13436-15

OHIO REVISED CODE §2939.10

2939.10 Who shall have access to grand jury

The prosecuting attorney or assistant prosecuting attorney may at all times appear before the grand jury to give information relative to a matter cognizable by it, or advice upon a legal matter when required. Such prosecuting attorney may interrogate witnesses before such jury when the jury or the prosecuting attorney find it necessary, but no person other than the grand jurors

shall be permitted to remain in the room with the jurors while the jurors are expressing their views or giving their votes on a matter before them.

* * * * *

HISTORY: 1953 H 1, eff. 10-1-53
GC 13436-7

OHIO REVISED CODE §2939.20

2939.20 Indictment by twelve jurors

At least twelve of the grand jurors must concur in the finding of an indictment. When so found, the foreman shall indorse on such indictment the words "A true bill" and subscribe his name as foreman.

HISTORY: 1953 H 1, eff. 10-1-53
GC 13436-17

ABA, SECTION OF LITIGATION, UNPUBLISHED PAPER, 531-0023/4T, © 1988

ANTITRUST REMEDIES FOR A FORMER EMPLOYEE SUED FOR TRADE SECRET MISAPPROPRIATION

By Edward F. Mannino
Baskin Flaherty Elliott & Mannino, P.C.
Philadelphia, Pennsylvania*

1. The initiation of litigation to protect trade secrets or to enforce a restrictive covenant may give rise to an antitrust counterclaim under Section 2 in favor of the defendant in the trade secret suit. While early Supreme Court decisions required "a pattern of baseless, repetitive claims" to permit an antitrust suit to be grounded upon the filing of litigation, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973), the more recent decision in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635 n.6 (1977), has left open the possibility that the filing of one sham suit may be a sufficient basis on which to file an antitrust counterclaim under Section 2.

2. Following the Supreme Court's decision in *Vendo Co., supra*, the lower courts have divided on whether one suit or a series of suits is required to form the basis for a Section 2 counterclaim.

   (a) Cases holding that more than one suit is required include *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484 (8th Cir. 1985),

* This paper was originally prepared in June of 1986 and has been updated through May of 1988. Patricia A. Wentworth's assistance is gratefully acknowledged.

cited with approval in *Hufsmith v. Weaver*, 817 F.2d 455 (8th Cir. 1987); *City of Cleveland Elec. Illuminating Co.*, 734 F.2d 1157 (6th Cir. 1984); *Aquarian Products, Inc. v. Dyna Clean, Inc.*, 42 BNA Antitrust & Trade Reg. Rep. 1038 (9th Cir. 1982) (unpublished opinion); *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 670 (9th Cir. 1980); *Taylor Drug Stores, Inc. v. Associated Dry Goods Corp.*, 560 F.2d 211 (6th Cir. 1977); *WCCB-TV, Inc. v. TeleRep., Inc.*, 601 F. Supp. 284 (W.D.N.C. 1985); *U.S. Audio & Copy Corp. v. Phillips Business Systems, Inc.*, 1983-1 Trade Cases ¶65,364 (N.D. Cal. 1983); *S.M. Arnold, Inc. v. Union Carbide Corp.*, 487 F. Supp. 1182, 1184 (E.D. Mo. 1980); *Reaemco, Inc. v. Allegheny Airlines*, 496 F. Supp. 546 (S.D.N.Y. 1980); *Mountain Grove Cemetery Ass'n v. Norwalk Vault Co.*, 428 F. Supp. 951 (D. Conn. 1977); *Central Bank of Clayton v. Clayton Bank*, 424 F. Supp. 163 (E.D. Mo. 1976), *aff'd*, 553 F.2d 102 (8th Cir. 1977), *cert. denied*, 433 U.S. 910 (1977). *See also Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 840 (9th Cir. 1980); *Bethlehem Plaza v. Campbell*, 403 F. Supp. 966, 970-71 (E.D. Pa. 1975).

(b) Cases holding that the filing of one suit is sufficient include *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983); *Aydin Corp. v. Loral Corp.*, 718 F.2d 897 (9th Cir. 1983); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983); *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 42 BNA Antitrust & Trade Reg. Rep. 990 (9th Cir. 1982); *Victory Beauty Supply Co. v. Lus-Ter-Oil Beauty Products*, 562 F. Supp. 786

(N.D. Ill. 1983); *National Cash Register Corp. v. Arnett*, 554 F. Supp. 1176 (D. Colo. 1983); *First American Title Co. v. S.D. Land Title Ass'n*, 541 F. Supp. 1147 (D.S.D. 1982); *Picante, Inc. v. Jiminez Food Products, Inc.*, 1982-2 Trade Cases ¶64,977 (W.D. Tex. 1982); *Sage Int'l Ltd. v. Cadillac Gage Co.*, 507 F. Supp. 939 (E.D. Mich. 1981); *Technician Medical Information Systems Corp. v. Green Bay Packaging, Inc.*, 480 F. Supp. 124 (E.D. Wisc. 1979); *Colorado Petroleum Marketers Ass'n v. Southland Corp.*, 476 F. Supp. 373 (D. Colo. 1979); *Cyborg Systems, Inc. v. Management Science America, Inc.*, 1978-1 Trade Cases ¶61,927 (N.D. Ill. 1978). *See also Associated Radio Service Co. v. Page Airways Inc.*, 414 F. Supp. 1088, 1096 (N.D. Tex. 1976), *aff'd*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Aircapital Cablevision v. Starlink Communications*, 634 F. Supp. 316 (D. Kan. 1986) (single lawsuit may come within sham exception to Noerr-Pennington doctrine only if it involves serious abuse, misuse, or corruption of the judicial process).[1]

[1] The Noerr-Pennington doctrine provides an exception to Sherman Act liability for activities comprising mere solicitation of governmental action with respect to the passage and enforcement of laws, regardless of the soliciting party's anticompetitive purpose. The rationale behind the rule is to protect both the right of private parties to petition the government and the government's interest in a free flow of information and views. *See C.H. Smith Trucking v. Bill Hodges Trucking*, 671 F. Supp. 1329, 1333 (W.D. Okla. 1987). Immunity from antitrust liability under the Noerr-Pennington doctrine does not extend to parties whose activities are merely a sham to cover an attempt to interfere directly with the business relationships of a competitor or to bar competitors from meaningful access to an agency or tribunal. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Supreme Court extended the sham exception to courts and administrative adjudicative bodies.

(c) Other cases have held that the filing of a single lawsuit may be enough only if combined with other actions, or if part of a larger conspiracy. *Omni Resource Dev. Corp. v. Conoco, Inc.*, 739 F.2d 1412 (9th Cir. 1984) (when one suit and not a pattern is challenged, finding that the suit is a sham requires not only that the suit be baseless, but also that it has other characteristics of grave abuse, such as being coupled with actions or effects external to the suit that are themselves anticompetitive); *Rickards v. Canine Eye Registration Found.*, 1986-1 Trade Cases ¶66,969 (N.D. Cal. 1986), citing to *Omni; WCCB-TV, Inc. v. TeleRep, Inc.*, 601 F. Supp. 284 (W.D.N.C. 1985) (filing of a suit was immune from antitrust action when no other anticompetitive acts were alleged); *U.S. Audio & Copy Corp. v. Phillips Business Systems*, 1983-1 Trade Cases ¶65,364 (N.D. Cal. 1983) (institution of a lawsuit by a distributor against its supplier would not immunize the distributor from antitrust liability if the lawsuit were part of a larger conspiracy). *But see In re Burlington Northern, Inc.*, 822 F.2d 518, 525 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 701 (1988) (documents prepared by railroad in connection with lawsuits against pipeline company were protected from discovery to the extent that the activities were genuinely intended to influence governmental action, even if they were part of a larger scheme of anticompetitive conduct).

3. To determine the existence of sham litigation, courts have relied on various theories and buzzwords. These include intent to interfere improperly with the business relations of a competitor, *Aydin Corp. v. Loral Corp.*, 718 F.2d 897 (9th Cir. 1983); *MCI*

Communications v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 105 S. Ct. 253 (1983); abuse of the judicial process, *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 691 F.2d 678 (4th Cir. 1982), *cert. denied*, 105 S. Ct. 253 (1983), including the filing of a lawsuit without probable cause, *Black Hills Jewelry Mfg. Co. v. Felco*, 1983-2 Trade Cases ¶65,561 (7th Cir. 1983); whether the defendant had filed its suit in good faith, *Columbia Pictures Indus. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983); and denial of a competitor's access to a judicial tribunal, *First American Title Co. v. S.D. Land Title Ass'n*, 541 F. Supp. 1147 (D.S.D. 1982). The test for sham litigation requires examination of the litigant's intent. The controlling issue is whether the litigant wished to accomplish its anticompetitive end through obtaining court-ordered relief or simply through filing and maintenance of lawsuits. *See In re Burlington Northern, Inc.*, 822 F.2d 518, 527-29 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 701 (1988) (antitrust plaintiff must sustain burden of showing that the defendant was not "significantly motivated by a 'genuine desire for judicial relief' "; this desire for relief must be both honest and reasonable). *But see Sessions Tank Liners, Inc. v. Joor Mfg.*, 827 F.2d 458 (9th Cir. 1987) (petitioning may be sham when, although defendant genuinely seeks to achieve his governmental result, he does so through improper means).[2]

[2] Sham litigation is not limited to actions initiating lawsuits. Defensive litigation can also be sham. *In re Burlington Northern, Inc., supra*, 822 F.2d at 532 (court perceives no reason to apply any different standard to defending lawsuits than to initiating them; to the extent that the defendant's litigation activities are not significantly motivated by an honest and reasonable desire to influence the court's decision and affect the outcome of the case, they are not entitled to protection from antitrust scrutiny).

4. Because of the first amendment considerations implicated in the filing of litigation and resort to the courts or administrative agencies, some courts have held that special pleading requirements should be imposed for antitrust claims founded upon the filing of litigation. *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd.*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977); *Caplan v. American Baby*, 582 F. Supp. 869 (S.D.N.Y. 1984); *Miller & Son Paving, Inc. v. Wrightstown Twp. Civ. Ass'n*, 443 F. Supp. 1268, 1273 (E.D. Pa. 1978), *aff'd*, 595 F.2d 1213 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979); *Mountain Grove Cemetery Ass'n v. Norwalk Vault Co.*, 428 F. Supp. 951, 956 (D. Conn. 1977); *Bethlehem Plaza v. Campbell*, 403 F. Supp. 966, 971 (E.D. Pa. 1975). *See also Association of Data Processing Services Org. v. Citibank, N.A.*, 508 F. Supp. 91 (S.D.N.Y. 1980). In the context of the filing of one lawsuit as grounds for an antitrust claim, this special pleading requirement calls for pleading of facts indicating that the filing of the single lawsuit involved some abuse or corruption of the judicial or administrative process. *St. Joseph's Hosp. v. Hospital Auth. of America*, 620 F. Supp. 814 (S.D. Ga. 1985); *Mountain Grove, supra*, 428 F. Supp. at 955.

5. Other courts have expressly refused to impose such a special pleading requirement. *See, e.g., Sage Int'l, Ltd. v. Cadillac Gage Co.*, 507 F. Supp. 939, 942-44 (E.D. Mich. 1981), and cases cited therein.

6. Where one suit is relied upon as the basis for an antitrust counterclaim, it has been held in the context of a trade secrets misappropriation claim that the defendant in such an action must allege

that the filing or prosecution of the trade secrets suit involved some "misuse or corruption of the judicial process," and that an allegation that such a suit was "brought without probable cause and for an anticompetitive purpose" was insufficient to state a claim for relief under Section 2. *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171 (10th Cir. 1982). *See also Mountain Grove, supra*, 428 F. Supp. at 955; *Aircapital Cablevision v. Starlink Communications*, 634 F. Supp. 316 (D. Kan. 1986).

7. A corporation engaged in the development, marketing, and distribution of computer hardware and software sued its competitor, a former employee, for misappropriation of trade secrets. When "victory for NCR [the established firm] would put the defendant [the fledgling firm] out of business" and "defendant claims that technical proof will show that NCR must have realized that the programs or systems allegedly misappropriated were significantly different," then the conclusion may be drawn that plaintiff's case was a sham. *National Cash Register Corp. v. Arnett*, 554 F. Supp. 1176, 1178 (D. Colo. 1983).

8. Even if the lawsuit which forms the basis for the Section 2 claim is terminated in favor of the Section 2 defendant, antitrust liability for filing and prosecuting such a suit may not be automatically precluded, and success in that litigation is only one factor to be considered in ruling on the Section 2 claim. *Ross v. Bremer*, 1982-2 Trade Cases ¶64,746 (W.D. Wash. 1982); *Sunergy Communities, Inc. v. Aristek Properties, Ltd.*, 535 F. Supp. 1327 (D. Colo. 1982). While some successful petitioning may be sham, a general presumption exists that "successful

judicial action is not a 'sham.' " *In re Burlington Northern, Inc., supra,* 822 F.2d at 527 n.6 (5th Cir. 1987). *See generally P. Areeda & H. Hovenkamp,* Antitrust Law 11, 13 (Supp. 1986). Success or failure is indicative as an evidentiary matter, but it is not determinative of the party's intent. *St. Joseph's Hosp., supra,* 620 F. Supp. 814 (S.D. Ga. 1985). Success or failure is also helpful in determining the good faith of the party instituting the lawsuit. *Columbia Pictures Indus. v. Redd Horne, Inc.,* 749 F.2d 154 (3d Cir. 1984). Indeed, in *Baxter Travenol Laboratories v. LeMay,* 536 F. Supp. 247 (S.D. Ohio 1982), a case involving a former employee's alleged theft of trade secrets, the court allowed bifurcation, with the original plaintiff's complaint being tried first in advance of the antitrust counterclaim in order to aid in determining whether the complaint was baseless, and therefore a sham. *See also Aircapital Cablevision v. Starlink Communications,* 634 F. Supp. 316 (D. Kan. 1986) (antitrust counterclaim alleging that copyright infringement suit was a sham, was bifurcated and copyright suit was later found to be protected by Noerr-Pennington doctrine). Other factors to be considered include "whether defendants intended to harm their competitors by misusing the adjudicatory process by *bringing* the lawsuit without regard or concern about the *result* of the lawsuit; and whether the lawsuit itself would have been baseless or meritless but for the use of deception on the courts." *Ross, supra,* 1982-2 Trade Cases at 71,618. *See also Neuman v. Reinforced Earth Co.,* 594 F. Supp. 139 (D.D.C. 1984), *cert. denied,* 107 S. Ct. 181 (1986); *Chest Hill Co. v. Guttman,* 1981-2 Trade Cases

¶64,417, at 75,054-059 (S.D. Ohio 1981); and Note, *"Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process,"* 86 *Harv. L. Rev.* 715 (1973).[3] An exception to this rule is found when the issue of the Section 2 defendant's good faith in instituting the challenged lawsuit is itself litigated in the original proceeding. When the Section 2 defendant succeeds on this point, its good faith is res judicata in the subsequent Section 2 lawsuit. *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 1982-1 Trade Cases ¶64,451 (N.D. Ill. 1981); Note, *"The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction,"* 91 *Harv. L. Rev.* 1281, 1287 (1978).

9. Success or failure is also not solely indicative of an attorney's liability for pursuing plausible claims. When an attorney files a complaint which offers a new theory cutting against much precedent, and it is determined that he instituted the claim solely because of the cost the suit would impose on his client's competitors, even if his client prevails in the action, he may be liable for fees in bad faith because the case has caused his client's adversaries to bear excessive costs. *In re TCI Ltd.*, 769 F.2d 441 (7th Cir. 1985).

10. If the challenged lawsuit is found to have been sham, the Section 2 plaintiff may recover the costs of defending the suit. *See Rickards v. Canine Eye*

[3] *See also Von Bulow v. Von Bulow*, 657 F. Supp. 1134, 1145 (S.D.N.Y. 1987) in which the court rejected plaintiff's analogy between an action for malicious prosecution as a predicate act under RICO and the antitrust doctrine of liability for repetitive, sham litigation.

Registration Found., 1986-1 Trade Cases ¶66,969 (N.D. Cal. 1986); *Syufy Enterprises v. American MultiCinema, Inc.*, 602 F. Supp. 1466 (N.D. Cal. 1983), *cert. denied*, 107 S. Ct. 876 (1987), *aff'd in part rev'd in part*, 783 F.2d 878 (9th Cir. 1986); *Rahal v. Crestmont Cadillac Corp.*, 514 F. Supp. 926 (N.D. Ohio 1981).

11. A federal court may not, however, enjoin the prosecution of a single pending state court trade secrets case or other suit on the basis that it constitutes sham litigation violative of the *Sherman Act. Vendo Co. v. Lektro Vend Corp.*, 433 U.S. 623 (1977); *Robert Heller Ass'n v. Sperry Univac Div.*, 452 F. Supp. 142, 144 (S.D.N.Y. 1978); Note, *supra*, 91 *Harv. L. Rev.* at 1300 n.100.

12. Because of the skeptical attitude often taken by the federal courts to claims that lawsuits instituted against a Section 2 plaintiff were sham, careful attention must be devoted in drafting the antitrust complaint to alleging with some specificity the elements of a Section 2 violation, including the defendant's market share and power, unlawful means in attaining such power, the definition of the relevant product and geographic markets, the precise nature and effect on competition of any exclusionary acts, and the nature of any abuse or corruption of the judicial or adjudicatory process resulting from allegedly sham litigation. *See Mackey v. Sears Roebuck & Co.*, 237 F.2d 869, 873 (7th Cir. 1956); *appeal dismissed*, 355 U.S. 865 (1957); *Sumney v. Ford Motor Credit Co.*, 449 F. Supp. 132, 141 (D.S.C. 1976), *aff'd*, 573 F.2d 1306 (4th Cir. 1978); *National Research Bureau, Inc. v. Bartholomew*, 331 F. Supp. 1003, 1005 (W.D. Pa.

1971), *modified on other grounds*, 482 F.2d 386 (3d Cir. 1973); *B&B Oil & Chem. Co. v. Franklin Oil Corp.*, 293 F. Supp. 1313, 1319 (E.D. Mich. 1968); *McElhenney Co. v. Western Auto Supply*, 167 F. Supp. 949, 956 (W.D.S.C. 1958), *aff'd*, 269 F.2d 332 (4th Cir. 1959). When an antitrust plaintiff fails to produce evidence of market data or to identify the market power of the defendants individually or collectively, its proof of monopoly power is "fatally defective." *See C.H. Smith Trucking v. Bill Hodges Trucking*, 671 F. Supp. 1329, 1336 (W.D. Okla. 1987) ("[t]he elements of monopolization under Section 2 are 'the possession of monopoly power in the relevant market' and 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident'.")

13. The First Circuit has recently held that the exaction of licensing agreements through the bad faith assertion of trade secrets by a party in a far superior bargaining position with the intent of restraining competition and monopolizing the market is a violation of the antitrust laws. Though not directly involving sham litigation, the standards relied on by the court are analogous. In resolving the tension between the antitrust and trade secret laws, the court held that a proper balance is achieved by requiring the antitrust plaintiff to prove that the defendant asserted trade secrets with the knowledge that no trade secrets existed. *CVD, Inc. v. Raytheon, Co.*, 769 F.2d 842 (1st Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

AFFIDAVIT OF LESTER W. SMITH

(Filed January 28, 1986)

Case No. C85-3451A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING, INC., *et al.*,
Defendants.

AFFIDAVIT OF PLAINTIFF LESTER W. SMITH IN OPPOSITION TO AN FRCP 56 MOTION FILED DECEMBER 30, 1985 BY COMBUSTION ENGINEERING

AFFIDAVIT

I am LESTER W. SMITH, a plaintiff in this action. After first being duly sworn, I state under oath and of my own personal knowledge that the following facts are true.

1. I read each and every allegation in the Complaint in this action prior to filing thereof on November 18, 1985, and believed them to be true to the best of my knowledge.

2. My signature appears on page 22 of the Complaint under this statement.

VERIFICATION

Lester W. Smith, says that he has read the allegations contained in the Complaint, and that they are true as he verily believes and to the best of my knowledge.

3. That I have just finished another reading of the allegations in the Complaint, and again affirm or reaffirm that the allegations thereof are true.

4. I do wish to make two additional statements.

A. At no time since I left the employment of Combustion Engineering in 1976 can I recall having received any money or other compensation from Combustion Engineering or C-E Cast Equipment for my services as an executive or as an engineer; except that I was paid for three months service as a consultant to C-E Cast Equipment.

B. At no time after the search of my residence on December 8, 1981 have I ever received money or other compensation from Combustion Engineering or C-E Cast Equipment, or from any person or company whom I knew to be associated with them, for anything: not before January 13, 1984; not on January 13, 1984; not after January 13, 1984.

At this time, I have nothing further to say.

/s/ LESTER W. SMITH
310 Simon Road
Hudson, Ohio 44236

January 28, 1986

Sworn to and subscribed before me, a Notary Public in and for the State of Ohio.

/s/ (Illegible)
Notary Public
My Commission Expires
June 16, 1986

January 28th, 1986

AFFIDAVIT OF LESTER W. SMITH

(Filed December 10, 1986)

Case No. C85-3451A

PLAINTIFF'S EXHIBIT 200

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER W. SMITH, *et al.*,
Plaintiffs,

vs.

COMBUSTION ENGINEERING INC., *et al.*,
Defendants.

FURTHER AFFIDAVIT OF LESTER W. SMITH

State of Ohio
County of Summit } ss.:

LESTER W. SMITH, being first duly sworn, deposes and says:

1. Affiant is of lawful age and resides at 310 Simon Road, Hudson, Ohio 44236.

2. Affiant is a plaintiff in Case No. C85-3451A filed in United States District Court for the Northern District of Ohio, Eastern Division.

3. Affiant has personal knowledge of the facts sworn to herein excepting only those expressly sworn to upon information and belief.

4. That Affiant has read for himself and understands the words of an attorney for defendants as set forth in a document with the title REPLY BRIEF OF THE COMBUSTION ENGINEERING DEFENDANTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.

5. That Affiant challenges the truth and accuracy of statements of fact made by an attorney for defendants in the REPLY BRIEF, including the statements appearing on the various pages as indicated in the following paragraphs.

6. Attached hereto as Exhibit 201 is a document comprising nine (9) pages excerpted from a C-E Cast document entitled—

Ad Hoc Committee Report, October 7, 1975

A copy of Exhibit 201 was first made of record as Defendant Smith's Motion Exhibit A on October 7, 1982 in a matter being heard before the Court of Common Pleas (Criminal Branch) as *State of Ohio vs. Lester W. Smith, et al.* A witness, Edwin Kavanagh, was cross-examined using [Exhibit 201]. As recorded in the transcript of the hearing (Tr. 91, 92)—

> "Q. Showing you what has been marked for identification as one page of a book that is entitled, "The Ad Hoc Committee Report on C-E Cast Equipment", you are familiar with this report, aren't you, Mr. Kavanagh?
>
> A. I have not seen this specific report. I know there was a report made, and I know there were discussions of it, but at the particular time I was not involved in that evaluation.
>
> Q. I invite your attention here to Page III-28, Subsection, parts. Would you read to Judge Corrigan what it says there, please?

MR. GASPER: Object.
THE COURT: Overruled.
THE WITNESS: "The market for parts for various C-E Cast Equipment products is estimated to be approximately $14,000,000. At the present time C-E Cast Equipment's own share of this business is only in the 20 percent-30 percent range.

In 1973 the volume of parts orders increased substantially, causing very severe delivery problems for Cast Equipment. Lack of availability of parts had an adverse effect on volume in 1974 and, to date, in 1975.

Corrective measures adopted in 1974 and 1975 to improve the share of the market which Cast Equipment gets includes the following:"

7. The above excerpt from the Kavanagh testimony contradicts the argument by the attorney, page 2—"The focus in this law suit must remain on 'make' type spare parts for C-E Cast molding machines." I believe and assert it to be clear beyond doubt that the market for replacement or spare parts included many parts other than "make" parts.

8. On page 3 of the Reply Brief, the attorney says as a truth that ". . . C-E Cast's detailed drawings and specifications, . . . were confidential, protected and not available to anyone outside of C-E Cast." I believe and assert that this statement was incorrect in 1975 and also in 1980-81, and, I further believe and assert that a statement appearing on the last line of page 1 of Exhibit 201 represents the truth—*One must conclude that the drawings and technical information required to produce the parts are readily available.*

9. I further believe and assert that customers of C-E Cast did have access to detailed plans for their foundry equipment as indicated by the statements

appearing in Exhibit 201 at the bottom of page 8 and the top of page 9—

> *(c) Plans For The Machine*
>
> Many purchasers indicated a desire to *receive promptly* the *detailed plans to their Spo installation.* This is not a major concern, but one which was frequently brought up. It is *related to the spare parts problem* because those foundries with in-house machining capabilities resort to making their own parts when they cannot get them from C-E Cast.

10. Having been involved in the matters alleged in the Complaint as an indicted criminal defendant subsequent to December 8, 1981 and until date of filing the Complaint on November 18, 1985, it is my belief and assertion that defendant Edwin Kavanagh and non-party Edward Niam of Niam Investigations did provide and give to Frank C. Gasper, the assistant Cuyahoga County Prosecutor, factual information known to be false, fraudulent and misleading.

FURTHER, Affiant sayeth naught.

/s/ LESTER W. SMITH

SWORN TO AND SUBSCRIBED before me, a Notary Public in and for the county aforesaid, this 10th day of December, 1986.

/s/ JULIE A. GARCIA (MOLLOHAN)
Notary Public
State of Ohio
Resident Summit County
My Commission Expires
(Illegible), 1987

LETTER, EDWARD NIAM TO JAMES B. KELLY, JANUARY 27, 1984

EXHIBIT 2

EDWARD NIAM
INVESTIGATIONS, INC.

(216) 535-5764
Suite 320
277 S. Broadway
Akron, Ohio 44308

EDWARD NIAM, JR.
President

January 27, 1984

Combustion Engineering Inc.
Mr. James B. Kelly
Group Vice President
Industrial Products
900 Long Ridge Road
Stamford, Conn 06902

Dear Mr. Kelly:

Although we never met, your name has come up often in the past couple of years. Anytime an important decision had to be made, we always heard someone from C-E Cast mention something about "Kelly from Corporate."

My purpose in writing is simply to say that it was a pleasure working for Combustion Engineering and C-E Cast. I hope that in some small way we were able to help obtain the necessary evidence and bring the case to a desirable conclusion.

Although the penalties may not seem harsh enough to fit the crimes, there are other forms of built in punishments, as I am sure you are already aware. The loss of employment and income, expensive attorney's fees, public disgrace and humiliation, being humbled into

pleading guilty in a criminal offense and the psychological trauma of over two years of uncertainties can often weigh more heavily than a prison term.

During any investigation the cooperation of the client is essential in achieving successful results. The dynamic leadership of William Roche was a key element in continuing a sustained drive during the more intense periods of the case. George Fisher also played an important role, and was involved in almost every phase of the investigation.

There is no doubt in my mind that we would not have been victorious without the energy, enthusiasm and determination of Edwin Kavanagh. His knowledge of the industry, his ability to work under the most exasperating conditions and his capacity for detail made him the most valuable member of our team. If I had to describe him in one word, it would be "great."

And of course there were others at C-E Cast, too numerous to mention, who also made invaluable contributions.

My congratulations to you and your company for having the courage to step forward and bring the weight of prosecution to bear against a group of criminals. It was a step forward for American industry and all of us who have an interest in combating White Collar Crime.

If we can ever again be of service, do not hesitate to contact me at any time.

Sincerely,

EDWARD NIAM, JR.
EDWARD NIAM, JR.
President

elk

LETTER, EDWARD NIAM TO WILLIAM F. ROCHE, FEBRUARY 3, 1984

EXHIBIT 3

EDWARD NIAM
INVESTIGATIONS, INC.

(216) 535-5764
Suite 320
277 S. Broadway
Akron, Ohio 44308

EDWARD NIAM, JR.
President

February 3, 1984

Mr. William F. Roche
President
C-E Basic
845 Hanna Building
Cleveland, Ohio 44115

Dear Mr. Roche;

You are already aware I'm sure that the case against "Lester and the boys" has been concluded. Although they aren't going to prison, they have suffered enormously, and the effects will be with them for a long time to come.

Many thanks to you and your staff for the first class treatment we received throughout the entire case. It was an interesting investigation and was an educational experience for us all. Needless to say I couldn't say enough about Ed Kavanagh. We could not have gone as far as we did without him. He is one of the best "investigators" we have ever worked with.

For me personally, this case was quite a growing experience. I especially benefitted from observing your actions and reactions during crucial periods of the

investigation. Whenever I am in need of sound opinions regarding management, I hope I can call on you for advice and counsel.

Again thank you, and if we can ever be of service, do not hesitate to call me at any time.

Sincerely,

EDWARD NIAM, JR.
EDWARD NIAM, JR.
President

elk

LETTER, EDWARD NIAM TO PETER PHIPPS, JANUARY 30, 1984

EXHIBIT 4

EDWARD NIAM
INVESTIGATIONS, INC.

(216) 535-5764
Suite 320
277 S. Broadway
Akron, Ohio 44308

EDWARD NIAM, JR.
President

January 30, 1984

Mr. Peter Phipps
Akron Beacon Journal
44 East Exchange Street
Akron, Ohio 44328

Dear Peter;

Just a note of thanks for all the coverage you gave us on the C-E Cast case. As you know it is finally concluded, and C-E Cast and Combustion Engineering were happy with the results.

If we can ever be of service, do not hestitate to contact me at any time.

Sincerely,

EDWARD NIAM, JR.
EDWARD NIAM, JR.
President

elk

LETTER, EDWARD NIAM TO TOM BERES, FEBRUARY 1, 1984

EXHIBIT 5

EDWARD NIAM
INVESTIGATIONS, INC.

(216) 535-5764
Suite 320
277 S. Broadway
Akron, Ohio 44308

EDWARD NIAM, JR.
President

February 1, 1984

Mr. Tom Beres
National Broadcasting Company, Inc.
1403 East Sixth Street
Cleveland, Ohio 44111

Dear Tom;

Just a note of thanks for the fantastic job you did in getting the C-E Cast case so much news coverage. There is no doubt in my mind that your efforts helped us bring the case to a successful conclusion.

If I can ever be of service, do not hestitate to contact me at any time.

Sincerely,

EDWARD NIAM, JR.
President

elk

LETTER, EDWARD NIAM TO RICHARD LOBO, FEBRUARY 1, 1984

EXHIBIT 6

EDWARD NIAM
INVESTIGATIONS, INC.

(216) 535-5764
Suite 320
277 S. Broadway
Akron, Ohio 44308

EDWARD NIAM, JR.
President

February 1, 1984

Mr. Richard Lobo
Vice President-General Manager
National Broadcasting Company, Inc.
1403 East Sixth Street
Cleveland, Ohio 44111

Dear Mr. Lobo;

Many thanks are in order for the excellent news coverage your station gave to the C-E Cast industrial espionage case recently concluded in Cuyahoga County Common Pleas Court.

Special commendation should be given to Tom Beres who was responsible for our case receiving such extensive coverage. The professionalism and integrity he displayed and his grasp of the facts helped relate to the viewing public the inner workings of a classic case of industrial espionage. Roger Wolfe and the Akron Bureau also did an exemplary job covering the case from this end.

Again, thank you for your assistance, and if I can ever be of service do not hesitate to call me at any time.

Sincerely,

EDWARD NIAM, JR.
EDWARD NIAM, JR.
President

elk

LETTER, EDWARD NIAM TO ASSISTANT PROSECUTOR GASPER, JANUARY 30, 1984

EXHIBIT 7

EDWARD NIAM
INVESTIGATIONS, INC.

(216) 535-5764
Suite 320
277 S. Broadway
Akron, Ohio 44308

EDWARD NIAM, JR.
President

January 30, 1984

Assistant Prosecutor Frank Gasper
Cuyahoga County Prosecutor's Office
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44111

Dear Frank;

Just a note of thanks for all the time and energy you devoted to the C-E Cast case. Needless to say that without your efforts we would not have had a satisfactory conclusion to a very complex and often exasperating case.

We all learned a great deal working with you and hope to do it again sometime.

If we can ever be of service, do not hesitate to contact me at any time.

Sincerely,

EDWARD NIAM, JR.
EDWARD NIAM, JR.
President

elk

LETTER, EDWIN M. KAVANAGH TO EDWARD NIAM, JANUARY 16, 1984

EXHIBIT 8

C-E CAST EQUIPMENT
Combustion Engineering, Inc.
7887 Hub Parkway
Cleveland, Ohio 44125 U.S.A.

Tel. 216/524-9000
Telex 98-0548

C-E CAST EQUIPMENT

January 16, 1984

Mr. Edward Niam, Director
Edward Niam Investigations
277 South Broadway—Suite 320
Akron, Ohio 44308

Dear Ed:

Enclosed are copies of the "Settlement Agreement and Mutual Release" agreements signed by Lester W. Smith and Donald R. Blalock last Friday.

As we discussed, you should have a copy for your files in case any future litigation might arise.

Sincerely,

/s/ EDWIN M. KAVANAGH
EDWIN M. KAVANAGH
Vice President
Replacement Parts

2—Enc.

LETTER, EDWARD NIAM TO EDWIN KAVANAGH, FEBRUARY 1, 1984

PLAINTIFF'S EXHIBIT 20-5

EDWARD NIAM
INVESTIGATIONS, INC.

(216) 535-5764

Suite 320
277 S. Broadway
Akron, Ohio 44308

EDWARD NIAM, JR.
President

February 1, 1984

Mr. Edwin Kavanagh
Vice President
Replacement Parts
C-E Cast Equipment
7887 Hub Parkway
Cleveland, Ohio 44125

RE: Case No. ENI-110 Western Reserve Group, Inc. C/V# 81-0011

Dear Ed;

Enclosed is our *final* report regarding the "Marathon Case" as quoted from Channel 3's news report. You probably thought you would never see "This case is closed" on the last page of one of our reports.

From Donald, myself and our staff, I want to say that it was a pleasure working with you and your company. The case was the most interesting one we have had to date, and I can truthfully say that I don't recall a dull moment.

You are a professional in the truest sense of the word, and I truly believe that a desirable conclusion would not have been accomplished without your tireless efforts and perserverence.

A bond of friendship has developed between us that I hope will always continue. We are always at your service.

Sincerely,

EDWARD NIAM, JR.
President

Enclosures

elk

LETTER, LAWRENCE K. HUBBELL TO DONALD L. SOUTHAM, JANUARY 29, 1986

PLAINTIFF'S EXHIBIT 48-4 p.1

cc John Bren
Bill Roche

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■ 216/237-2233

ROYALTON
MANUFACTURING INC.

■ 18300 ROYALTON ROAD ■ P.O. BOX 33190
■ CLEVELAND, OHIO 44133-0190

January 29, 1986

Donald L. Southam
C-E Cast Equipment
Combustion Engineering
7887 Hub Parkway
Cleveland, Ohio 44125

Dear Mr. Southam:

Late in the summer of 1981, Royalton Manufacturing, Incorporated was approached by Ed Niam of Niam Investigations and subsequently by Ed Kavavagh of C-E Cast Equipment concerning the problem you were having with Western Reserve Group, Incorporated. They were also concerned with the extent of Royalton's involvement with Western Reserve Group, Incorporated.

As you are aware, Royalton's involvement with Western Reserve was that of a vendor. We quoted jobs, received purchase orders, and shipped completed parts. At no time was our relationship with Western Reserve anything other that that of buyer-seller.

Upon being informed of the questionable activities of Western Reserve, we informed Mr. Kavavagh that we

cease doing business with Western Reserve. At that point, Mr. Kavavagh asked us to continue doing business with Western Reserve and to assist C-E Cast with their investigation, which we did.

PLAINTIFF'S EXHIBIT 48-4 p. 2

As a result of our co-operation with C-E Cast in the investigation, we now find ourselves listed as co-defendants with Combustion Engineering in two (2) lawsuits. Since C-E Cast asked for our assistance in the investigation, and since we are listed as defendants in the lawsuits because of the role we played in the investigation, we feel that, at the minimum, C-E Cast is obligated to provide for our defense. Please consider this letter as our formal request for financial assistance from C-E Cast Equipment for providing our defense in the two (2) lawsuits (IE; Lester Smith & Don Blalock).

Please remit to Royalton Manufacturing, Incorporated, PO Box 33190, Cleveland, Ohio 44133. Legal fees to date are:

Gary A. Ebert	$ 621.60 for services rendered
William A. Hamann	5000.00 Retainer

Additional invoices will be sent to you as they are received.

Respectfully,

/s/ LAWRENCE K. HUBBELL
LAWRENCE K. HUBBELL
President

NOTE

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Exhibit 12, identified at page 115 of Kavanagh Deposition taken 5-20-86.

[Exhibit 12 (a poor copy) was filed 4-20-87 in an envelope attached to Dkt. Nr. 109, Response. At the hearing, Exhibit 12 will be easel mounted as a 24" x 36" copy of a drawing prepared at C-E Cast Equipment probably by defendant Kavanagh. The poor copy of this exhibit was furnished by Walter A. Bates, Esq., to Mack D. Cook, II, Esq., in response to a discovery request. The cooperation of Mr. Bates will be necessary to provide either the original or a fair copy of Exhibit 12.]